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IN THE

Supreme Court of the United States

MAYRA ISABEL JEREZ-SANCHEZ,
Petitioner,

v.

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed a provision of the Immigration and Nationality Act that previously had allowed the Attorney General to waive deportation for immigrants convicted of certain otherwise deportable offenses. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held, as a matter of statutory construction, that Congress did not intend for Section 304(b)'s repeal to have retroactive effect. The questions presented are:

1. Whether this Court's construction of IIRIRA Section 304(b) as not applicable to pre-enactment convictions applies to all immigrants whose convictions predate IIRIRA's enactment, as the Third and Eighth Circuits have held, or whether Section 304(b)'s retroactivity instead (a) turns on an immigrant's subjective reliance, as the Second Circuit here and the Fifth Circuit have held; (b) turns on objectively reasonable reliance, as the Tenth Circuit Court of Appeals has held; or (c) is categorically inapplicable to convictions obtained at trial, as the First, Fourth, Seventh, Ninth and Eleventh Circuits have held.

2. Whether the long-established presumption against retroactivity applies only when individuals can establish either subjective or objective reliance on prior law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mayra Isabel Jerez-Sanchez ("Ms. Sanchez") (a.k.a., Mayra Isabel Jerez Farmer) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 3a-11a) and the Immigration Judge (App., *infra*, 33a-34a, 39a-40a) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 41a-42a.

STATEMENT

1. Prior to 1996, an immigrant convicted of certain otherwise deportable offenses was entitled to seek a discretionary waiver of deportation from the Attorney General under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). That Section authorized the Attorney General to waive deportation or exclusion for immigrants who had a "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c) (1995); *see generally INS v. St. Cyr*, 533 U.S. 289, 295 (2001). "[A] substantial percentage" of applications for Section 212(c) relief were granted. *St. Cyr*, 533 U.S. at 296.[1]

During the 1990s, Congress substantially revised the nation's immigration laws. In 1990, Congress "amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years." *St. Cyr*, 533 U.S. at 297; *see* Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978,

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[1] The Board of Immigration Appeals ("BIA") and courts have consistently held that Section 212(c) applies to deportable immigrants as well as excludable aliens. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

5052. Then, in 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, which foreclosed Section 212(c) relief for immigrants convicted "of one or more aggravated felonies." *Id.* § 440, 110 Stat. 1277. Later that same year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Section 304(b) of which repealed the Attorney General's waiver authority under Section 212(c) altogether. Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. Congress replaced the waiver provision with a "cancellation of removal" procedure that gave the Attorney General the authority to waive "removal" (*i.e.*, deportation or exclusion) for a very narrow class of immigrants, but precluded such relief for anyone "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

In *INS v. St. Cyr*, this Court held, as a matter of statutory construction, that Congress did not intend for IIRIRA Section 304(b)'s repeal of the waiver provision to have a retroactive effect. The Court held first that IIRIRA contained no "clear indication from Congress that it intended such a [retroactive] result." *Id.* at 316 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994)). The Court held secondly that the Board of Immigration Appeals ("BIA") and courts have consistently held that Section 212(c) applies to deportable immigrants as well as excludable aliens. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). Applying the statute to St. Cyr would give the statute a "retroactive effect" because it would "attach a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). In particular, because St. Cyr had pled guilty to a deportable

offense at a time when the potential for waiver of deportation remained, and St. Cyr "and other aliens like him, almost certainly relied upon [the possibility of obtaining a § 212(c) waiver] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Applying the Court's "deeply rooted" "presumption against retroactive legislation," *id.* at 316, the Court accordingly held that Congress did not intend for its repeal of the waiver provision to apply.

2. Petitioner Mayra Jerez-Sanchez is a citizen and national of the Dominican Republic and was admitted to the United States as a Lawful Permanent Resident on March 14, 1976. App., *infra*, 3a. On September 16, 1994, Ms. Sanchez was convicted of distribution of a controlled substance (cocaine), in violation of 21 U.S.C. §§ 841(a)(1) and 846, and she was sentenced to five years and ten months confinement, which was reduced to four years and ten months after participating in a drug program. App., *infra*, 3a. She was ordered to serve four years on probation subsequent to her release from prison. App., *infra*, 3a.

Although Ms. Sanchez had already completed her prison sentence, she was placed on an immigration detainer, remained confined under Immigration and Naturalization Service authority, and was ordered excluded on September 10, 1997. App., *infra*, 3a. Ms. Sanchez appealed the Immigration Judge's decision to the Board of Immigration Appeals, and it was dismissed on March 5, 1999. App., *infra*, 3a. On June 9, 2000, the Immigration and Naturalization Service released Ms. Sanchez and placed her on an Order of Supervision which she has abided by for the

last ten years. App., *infra*, 3a. On April 15, 2009, Ms. Sanchez filed a "Special 212(c) Motion" with the BIA ("Board"). App., *infra*, 3a. On May 26, 2009, the BIA denied Ms. Sanchez's Motion to Reopen. On June 25, 2009, Ms. Sanchez filed a Petition for Review with the Second Circuit Court of Appeals. On January 7, 2010, the Second Circuit Court of Appeals issued an Order granting the government's Motion for Summary Affirmance. App., *infra*, 3a.

Ms. Sanchez was married to Bruce A. Farmer, a United States citizen, for over twenty two years before he passed away. App., *infra*, 3a. She has maintained stable employment for Limited Brands / Victoria's Secret for the last eight years, has filed taxes for the last thirteen years (even while incarcerated), and she is the proud mother of two children. App., *infra*, 3a. Ms. Sanchez's eldest child, Sergeant First Class Michael Ferreira, is a U.S. citizen currently serving his third tour of duty with the U.S. Army in Iraq and has been in the military for over nine years. App., *infra*, 3a. Ms. Sanchez's daughter, Ashley Briana Sanchez, is a junior at Seton Hill University in Greensburg, Pennsylvania. App., *infra*, 3a. Ms. Sanchez also currently owns her own home, mortgage free, which she purchased with her husband on December 16, 2003, in Union County, North Carolina. App., *infra*, 3a.

3. The Second Circuit Court of Appeals denied Ms. Sanchez's petition for review finding that she is not eligible for relief under § 212(c) of the INA due to her conviction of an aggravated felony after a jury trial. App., *infra*, 29a.

REASONS FOR GRANTING THE WRIT

This Court's review is necessary to resolve an ever-expanding and intractable conflict in the circuits on an important and recurring question of federal law that continues to affect thousands of individuals across the nation. Whether a statutory provision applies to pre-enactment conduct is ultimately a question of statutory construction, and the longstanding "presumption against retroactivity" "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes," and affords "legislators a predictable background rule against which to legislate." *Landgraf*, 511 U.S. at 272-273. In *St. Cyr*, this Court applied that established rule of statutory construction to hold that IIRIRA's repeal of Section 212(c)'s waiver provision was not intended to have retroactive effect. 533 U.S. at 326.

Like this case, *St. Cyr* involved a lawful permanent resident whose pre-IIRIRA conviction of a criminal offense rendered the alien deportable and ineligible for discretionary relief under IIRIRA's cancellation of removal provision. *Id.* at 293. At the time of both the underlying criminal conduct and of the conviction, however, both St. Cyr and Ms. Sanchez were eligible to seek a waiver of deportation from the Attorney General under Section 212(c). The only difference is that St. Cyr's conviction was obtained through a guilty plea and Ms. Sanchez's through the exercise of her constitutional right to a trial by jury, as she was convinced of her innocence. Based on the difference in how the immigrants' convictions were obtained, the Courts of Appeals have adopted widely varying decisions on IIRIRA Section 304(b)'s retroactive effect. As a result, a single provision of a single

federal statute has divergent operation across the country, resulting in profoundly life-altering differences in the law's effect for immigrants based on nothing more than geography. The sheer volume of cases raising the question and decrying the lack of clarity in retroactivity jurisprudence demonstrates the importance of this Court's intervention.

More broadly, the conflict in the circuits presented here is simply one example of widespread "substantial confusion" in the Courts of Appeals "as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive." *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004). The Court of Appeals' confusion is rooted in this Court's precedent. *Ibid* ("This confusion exists within the Supreme Court, in its decisions postdating *Landgraf*."). Accordingly, only this Court's intervention can bring needed uniformity and stability to federal law.

Finally, the rationale for applying *St. Cyr* type relief also extends to those aliens ordered deported or removed who while eligible for 212(c) relief could not or did not take the opportunity to do so. An 8 C.F.R. Section 1003.44 "Special Motion" was thus created to give such permanent residents the ability to seek 212(c) relief. Ms. Sanchez meets all of the requirements under 8 C.F.R. Section 1003.44 except that she did not make a special motion seeking such relief by April 26, 2005. *See* 8 C.F.R. § 1003.44. Ms. Sanchez never received notice of the availability of such special motions until the filing of her Motion to Reopen with the BIA. (App., *infra*, 33a) On September 24, 2004, the Department of Justice promulgated regulations that allowed for 212(c) relief for all pending cases before the immigration court, but yet set an

arbitrary 180 deadline of April 26, 2005, for those seeking 212(c) relief who did not have the opportunity to do so in deportation proceedings but who are otherwise similarly situated to those currently in removal proceedings. Such an arbitrary date set an unfair and unconstitutional demarcation between those currently in immigration court proceedings and those unfortunate individuals who had their immigration court proceedings closed. Years from now, an individual can be placed in removal proceedings and assert 212(c) relief (assuming that they meet the conviction date requirements). Yet, a woman who was in immigration detention when the deportation order was entered against her is now barred by an arbitrary 180-day filing deadline, of which she was given no notice, even though she was dutifully reporting to ICE detention and removal for the last ten years.

Though 212(c) relief still remains available to those aliens currently in deportation proceedings, immigration put an arbitrary sunset on Section 1003.44 "Special Motion" relief. This purported sunset provision established a new retroactive application of the 212(c) relief that was explicitly rejected under *St. Cyr*.

I. The Courts Of Appeals Have Splintered Over The Retroactivity Of IIRIRA's Repeal Of The Attorney General's Waiver Authority Under Section 212(c).

There is no dispute that Congress did not express in IIRIRA its intent that Section 304(b)'s repeal of the waiver provision have a retroactive effect. *See St. Cyr*, 533 U.S. at 320. The Courts of Appeals, however, are deeply divided over whether and when Section 304(b) has an "impermissible retroactive effect" as

applied to convictions entered prior to IIRIRA's enactment following a jury trial, rather than a guilty plea.

The Second Circuit's decision in this case maintains the existing disarray in the Courts of Appeals' cases. At this point, five circuits hold that IIRIRA's repeal of Section 212(c) does not apply to at least some convictions obtained after trial, while five other circuits hold that the repeal applies to all convictions obtained through trial prior to 1996. Within the former group, the Courts of Appeals have sub-divided further with two courts of appeals holding that IIRIRA's repeal does not apply to any pre-enactment convictions, while three other circuits including the Second Circuit here, require some showing of either subjective or objective pre-enactment reliance. Furthermore, the Second Circuit, by its own admission, directly contradicted their own subjective reliance requirement.

A. Five Circuits Hold That IIRIRA's Repeal Provision Does Not Apply To Certain Cases Where The Immigrant Was Convicted After Trial.

1. The Third and Eighth Circuits Hold that IIRIRA's Repeal Provision Has No Application to Any Pre-Enactment Convictions.

Following this Court's lead in *St. Cyr*, the Third Circuit has construed IIRIRA's repeal of the Attorney General's waiver authority as not applying to convictions entered before 1996. *See Atkinson v. Att'y Gen.*, 479 F.3d 222 (3d Cir. 2007). Contrary to the Second Circuit's holding here, the Third Circuit has recognized that "[n]owhere in the Supreme Court's juris-

prudence * * * has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry." *Id.* at 231. For example, as the Third Circuit explained, in *Landgraf* itself this Court concluded that applying a new punitive damages remedy to pre-enactment conduct would have retroactive effect, even though it was implausible to think that the absence of a punitive damages remedy would have informed or influenced an employer's decision whether or not to engage in long-outlawed sexual discrimination in employment. *Id.* at 228.

The Third Circuit further noted that this Court followed a similar course in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), in which the Court held that the removal of a defense had a retroactive effect without requiring defendants to show that they had relied on the existence of the defense in their pre-enactment conduct. *Atkinson*, 479 F.3d at 228-229. The Third Circuit acknowledged that, although "reliance" "is an element to consider in determining whether the enactment of a new law" has a retroactive effect, cases like *Landgraf* and *Hughes* demonstrate that "whether the party before the court actually relied on the prior state of the law is not the conclusive factor." *Id.* at 229.

Instead, the Third Circuit focused on the central *Landgraf* inquiry: whether the withdrawal of Section 212(c) relief "attached new legal consequences to [the immigrant's] conviction." *Atkinson*, 479 F.3d at 230. And the court concluded that, under the new law, the consequence of a prior deportable offense is *certain* deportation, whereas at the time of the offense the consequence was *possible* deportation that could be avoided by a successful application under Section 212(c). *Ibid.; see St. Cyr*, 533 U.S. at 325 ("There is a

clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

Recently, the Eighth Circuit followed suit, expressly adopting the Third Circuit's position that IIRIRA's repeal provision does not apply to pre-enactment convictions, whether obtained through plea or trial. *Lovan v. Holder*, 574 F.3d 990, *6-*7 (8th. Cir. 2009). What is critical, the Eighth Circuit explained, is that IIRIRA's repeal of Section 212(c)'s waiver program "attached a new legal consequence to [an immigrant's] conviction: the certainty—rather than the possibility—of deportation." *Id.* at *7.

Furthermore, in the closely analogous context of IIRIRA's application to convictions barring reentry into the United States, the Fourth Circuit has expressly adopted the Third Circuit's analysis and held that "reliance, in any form, is irrelevant to the retroactivity inquiry." *Olatunji*, 387 F.3d at 396. In the Fourth Circuit's view, what is controlling is that IIRIRA "attaches *new legal consequences*" to an immigrant's pre-enactment "*conviction.*" *Id.* at 395, 396.[2]

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[2] Underscoring the depth of confusion in circuit law, other Fourth Circuit cases hold that a defendant convicted after trial is categorically ineligible for section 212(c) relief. *See Chambers v. Reno*, 307 F.3d 284, 290-93 (4th Cir. 2002); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007). *Mbea*, decided several years after *Olatunji*, did not even mention that decision. *See Lovan v. Holder*, 574 F.3d 990, *6 n.1 (8th Cir. 2009) (noting the confusion in Fourth Circuit law); *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006) (noting the "tension between *Olatunji* and *Chambers*").

2. The Second and Fifth Circuits Hinge Retroactivity Upon a Showing of Subjective Pre-Enactment Reliance.

While the Fifth Circuit and the Second (allegedly) agree that IIRIRA's repeal of Section 212(c) can have a retroactive effect on convictions, regardless of whether they were obtained by trial or plea, those two circuits part company with the Third and Eighth Circuits by hinging their analysis on whether the immigrant can make an individualized showing of subjective reliance on the availability of Section 212(c) relief in deciding to proceed to trial. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). For example, the immigrant might have delayed applying for Section 212(c) relief "in order to establish a history of rehabilitation" that would improve her chances of obtaining relief. *Carranza-De Salinas*, 477 F.3d at 206; *see Restrepo*, 369 F.3d at 633.

In spite of the standard set forth in *Restrepo*, the Second Circuit issued a decision in 2008 that completely contradicted the court's own "subjective reliance" requirement. *See Zuluaga v. INS*, 523 F.3d 365, 375, n.4 (2nd Cir. 2008). The Second Circuit expressed that, "[they] never stated that petitioners must show reliance in every case . . . the fact that one factor may be determinative in certain cases does not mean that it is the only determinative factor in every case. *Id.* This statement further complicates the issue, but more importantly, detracts from the Second Circuit's position that reliance is an absolute requirement. Further, *Zuluaga* makes another strong point that, "it makes no sense at all to ask whether an alien, in committing a drug trafficking

offense, acted with 'an intention to preserve eligibility for relief under § 212(c),' (*quoting Rankine*, 319 F.3d at 100), or in an effort to 'conform his or her conduct according to the availability of relief,' (quoting, *St. Cyr*, 229 F.3d at 420) (noting the absurdity of the notion that aliens committed drug crimes in reliance on the continued availability of discretionary relief). In *Zuluaga* the Second Circuit concluded that although the respondent was not able to show a protectable reliance interest, this lack of reliance coupled with his jury trial conviction would not have precluded him from applying for section 212(c) relief if he was otherwise statutorily eligible. *Id.*

3. The Tenth Circuit Holds that IIRIRA's Repeal Provision Does Not Apply to Cases Involving Objective Reliance on the Prior Law.

The Tenth Circuit likewise agrees with the Third, Eighth, Second, and Fifth Circuits that IIRIRA's repeal can have a disfavored retroactive effect when applied to pre-1996 convictions, regardless of the procedure by which they were obtained. The Tenth Circuit furthermore agrees with the Second and Fifth Circuits (in conflict with the Third and Eighth) that reliance is the key to whether the repeal has an impermissible retroactive effect. Again, this is in spite of the fact that the Second Circuit made it clear that they do not always require reliance, objective or subjective. Therefore, unlike the Fifth Circuit, but similar to the Second Circuit, Tenth Circuit law does not necessarily require the immigrant to make an individualized showing of subjective reliance. Instead, it is sufficient that the immigrant belongs to a class of individuals for whom reliance on the availability of Section 212(c) would be "objectively

reasonable." *Hem v. Maurer*, 458 F.3d 1185, 1200 (10th Cir. 2006). The Tenth Circuit thus considers, for example, whether the immigrant forewent an appeal in her criminal case, reasoning that it would be objectively reasonable for a defendant to forego an appeal out of a concern that a successful appeal could lead to a new trial with a higher sentence that could render the defendant ineligible for Section 212(c) relief. *Id.* at 1199.

B. Five Circuits Hold That IIRIRA's Repeal Applies Categorically To All Defendants Convicted After Trial.

The First, Fourth *(but see note 4, supra)*, Seventh, Ninth, and Eleventh Circuits have held that a defendant convicted after a trial is categorically ineligible for Section 212(c) relief on the ground that a guilty plea, rather than a conviction at trial, is an indispensable prerequisite to finding that IIRIRA's repeal has a disfavored retroactive effect. *See Dias*, 311 F.3d at 458 (1st Cir. 2002); *Chambers*, 307 F.3d at 293 (4th Cir. 2002); *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *Armendariz-Montoya*, 291 F.3d 1116, 1121 (9th Cir. 2002); *Ferguson v. Attorney General*, 563 F.3d 1254 (11th Cir. 2009). Those Courts of Appeals have read *St. Cyr's* holding to turn fundamentally on the immigrant's presumed reliance upon the availability of Section 212(c) relief in deciding to waive his right to trial. Because in those Courts' view, the decision to go to trial would, inexplicably, not entail that same presumed *quid pro quo*, those circuits have concluded that the repeal of Section 212(c) can be applied to convictions that predate IIRIRA's enactment without imposing a disfavored retroactive effect. *See, e.g.*, *Dias*, 311 F.3d at 458; *Chambers*, 307 F.3d at 290.

The Seventh Circuit, however, has created a limited exception to its otherwise categorical rule. That court holds that IIRIRA Section 304(b) does not apply to pre-enactment trial convictions if the immigrant "conceded deportability before repeal in reliance on the possibility of § 212(c) relief." *De Horta Garcia*, 519 F.3d at 661.

C. This Case Exacerbates The Circuit Conflict And Provides An Appropriate Vehicle For Its Resolution.

In Ms. Sanchez's case, the Second Circuit contradicted their own previous findings and sided with the circuits that have declined to extend *St. Cyr* to aliens who were convicted after trial because such aliens' decisions to go to trial do not render them eligible for 212(c) relief. App., *infra*, 1a-2a. In so doing, the Second Circuit also departed from the approach it had taken and that taken by the Third Circuit and since adopted by the Eighth Circuit. That circuit conflict is ripe for resolution by this Court at this time and in this case.

1. The Conflict is Entrenched and Important.

The circuit conflict is considered, longstanding, and entrenched. With the Second Circuit's decision here, ten courts of appeals have now expressly considered and decided whether IIRIRA's repeal of Section 212(c) applies to pre-enactment convictions entered following a trial, rather than a guilty plea, and those decisions have produced a multi-tiered conflict in the circuits from which the courts of appeals cannot disentangle themselves. The Second Circuit made its decision in conscious rejection of the law previously adopted by their own circuit, as well as that of the

Third and Tenth Circuits. App., *infra*, 19a-22a, 29a. The Third and Tenth Circuits have similarly considered the conflicting rationales of other circuits, but have found them unpersuasive. *See Rankine v. Reno*, 319 F.3d 93, 102 (2d Cir. 2003); *Atkinson*, 479 F.3d at 227; *Hem*, 458 F.3d at 1191-1192. The Third Circuit, for example, although aware of its minority status, has continued to apply and reaffirm its rule in recent cases. *See, e.g., Williams v. Att'y Gen.*, No. 08-4179, 2009 WL 1510253, at *1 (3d Cir. June 1, 2009); *Cespedes-Aquino v. Att'y Gen.*, 498 F.3d 221, 224-225 (3d Cir. 2007). And the Eighth Circuit recently adopted the same view as the Third Circuit, fully aware that it was joining the minority position. *Lovan*, 574 F.3d 990, at *6-*7.

The Solicitor General has opposed certiorari in the past on the ground that the conflict "has diminishing prospective significance because it affects only removal proceedings for aliens convicted at trials before" 1996. Brief for the Respondent in Opposition at 13, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105. That argument fails for two reasons.

First, the government does not adhere to its own argument. The question here has the same significance and prospective import that the application of IIRIRA to plea bargains entered before 1996 had in *St. Cyr*. Yet in *St. Cyr*, it was the *government* itself that argued vigorously for and obtained this Court's certiorari review notwithstanding the purportedly "diminishing prospective significance" of the retroactivity question to pre-1996 plea bargains.

Moreover, while temporal limitations may appropriately influence the certiorari calculus in most contexts, it should not be accorded significance in cases

involving the retroactive effect of federal statutes. That is because in every such case—whether *St. Cyr*, *Hughes*, *Landgraf*, or *Martin v. Hadix*, 527 U.S. 343 (1999)—the question of a statute's retroactive effect is, by definition, of limited prospective significance.[3] Rather, when retroactivity is at issue, the more appropriate considerations are the sheer number of individuals affected and the severity of the impact. Both of those factors warrant this Court's exercise of its certiorari jurisdiction here.

The sheer number of circuit decisions—not to mention Board of Immigration Appeals cases—implicating the retroactive effect of IIRIRA's repeal of the Attorney General's discretionary waiver authority is a testament to its recurring importance and the significant reach a decision of this Court would have today and for a long time to come.[4]

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[3] Indeed, elsewhere the Government has not been deterred from seeking this Court's review of questions that are unlikely to recur or of arguably time-limited significance. *See, e.g.*, Petition for Writ of Certiorari, *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2007) (No. 07-308), 2007 WL 2608817 (seeking and obtaining review of question pertaining to tax refund claims for a tax the government had ceased to enforce years earlier); Petition for Writ of Certiorari, *United States v. Swisher Int'l, Inc.*, 531 U.S. 1036 (2000) (No. 00-415), 2000 WL 34000578 (seeking review of question of which statutory provision confers jurisdiction on the Court of International Trade to award refunds of a particular tax that had been found unconstitutional and therefore was no longer collected).

[4] The issue has arisen more than fifty-five times in the courts of appeals since *St. Cyr* was decided, many of these decisions in recent years. *See, e.g.*, *Ferguson v. Attorney General*, 563 F.3d 1254 (11th Cir. 2009); *De Johnson v. Holder*, 564 F.3d 95 (2d Cir. 2009); *Nadal-Ginard v. Holder*, 558 F.3d 61 (1st Cir. 2009); *Haque v. Holder*, 312 F. App'x 946 (9th Cir. 2009); *Molina-De La Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009); *Lovan v.*

Holder, 574 F.3d 990 (8th Cir. 2009); *Esquivel v. Mukasey*, 543 F.3d 919 (7th Cir. 2008); *Singh v. Mukasey*, 520 F.3d 119 (2d Cir. 2008); *United States v. De Horta Garcia*, 519 F.3d 658, (7th Cir. 2008); *Walcott v. Chertoff*, 517 F.3d 149 (2d Cir. 2008); *Prieto-Romero v. Mukasey*, 304 F. App'x 512 (9th Cir. 2008); *Manea v. Mukasey*, 301 F. App'x 589 (9th Cir. 2008); *Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008); *Lopez-Lopez v. Mukasey*, 285 F. App'x 440 (9th Cir. 2008); *Gallardo v. Mukasey*, 279 F. App'x 484 (9th Cir. 2008); *Morgorichev v. Mukasey*, 274 F. App'x 98 (2d Cir. 2008); *Martinez-Murillo v. Mukasey*, 267 F. App'x 519 (9th Cir. 2008); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Atkinson*, 479 F.3d 222 (3rd Cir. 2007); *Carranza-De Salinas*, 477 F.3d 200 (5th Cir. 2007); *Matian v. Mukasey*, 262 F. App'x 753 (9th Cir. 2007); *Singh v. Keisler*, 255 F. App'x 710 (4th Cir. 2007); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007); *Berishaj v. Gonzales*, 238 F. App'x 275 (9th Cir. 2007); *Cerbacio-Diaz v. Gonzales*, 234 F. App'x 583 (9th Cir. 2007); *Manzo-Garcia v. Gonzales*, 225 F. App'x 631 (9th Cir. 2007); *United States v. Munoz-Recillas*, 224 F. App'x 621 (9th Cir. 2007); *Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006); *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Kelava v. Gonzales*, 434 F.3d 1120 (9th Cir. 2006); *Garcia-Ortiz v. Gonzales*, 194 F. App'x 513 (10th Cir. 2006); *Rodriguez-Zapata v. Gonzales*, 193 F. App'x 312 (5th Cir. 2006); *Tecat v. Gonzales*, 188 F. App'x 308 (5th Cir. 2006); *Sidhu v. Gonzales*, 179 F. App'x 221 (5th Cir. 2006); *Evangelista v. Att'y Gen.*, 176 F. App'x 306 (3d Cir. 2006); *Pugliese v. Gonzales*, 174 F. App'x 601 (2d Cir. 2006); *Alvarez-Aceves v. Fasano*, 150 F. App'x 596 (9th Cir. 2005); *Crump v. Reno*, 130 F. App'x 500 (2d Cir. 2005); *Appel v. Gonzales*, 146 F. App'x 175 (9th Cir. 2005); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004); *Restrepo*, 369 F.3d 627 (2d Cir. 2004); *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004); *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004); *Swaby v. Ashcroft*, 357 F.3d 156 (2d Cir. 2004); *Montenegro*, 355 F.3d 1035; *Trevor v. Reno*, 88 F. App'x 445 (2d Cir. 2004); *Rankine*, 319 F.3d 93 (2d. Cir. 2003); *Quinones-Saucedo v. Ashcroft*, 83 F. App'x 865 (9th Cir. 2003); *Jaw-Shi Wang v. Ashcroft*, 71 F. App'x 624 (9th Cir. 2003); *Raya-Baez v. INS*, 63 F. App'x 381 (9th Cir. 2003); *Garcia v. Fasano*, 62 F. App'x 816 (9th Cir. 2003); *Serrano-Salcedo v.*

Furthermore, the interests at stake are profound—the retroactivity question can be the difference between certain deportation after decades of living and developing ties to the United States, and the opportunity for an immigrant to stay in her home and with her family. For example, in this case, Ms. Sanchez has lived in the United States for more than thirty years—nearly three-fourths of her life—and the "certain deportation" and inability to ever return that application of IIRIRA entails, *St. Cyr*, 533 U.S. at 325, will tear her away from her two children, one of whom is serving his third tour of duty for the U.S. Army in Iraq.

Second, the government's opposition overlooks the confusion over the proper test for retroactivity and the role of reliance as it extends beyond the Section 212(c) context. In *Olatunji*, the Fourth Circuit confronted an analogous question of IIRIRA's application to a pre-enactment conviction where that conviction would have barred a lawful permanent resident's reentry into the United States. 387 F.3d at 386. The Fourth Circuit held—just as the Third Circuit had in *Atkinson*—that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." *Id.* at 388. In conflict with the Second Circuit's alleged reliance requirement, *Olatunji* specifically held that "subjective reliance" should not be "relevant to the question of whether a particular statute is impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor

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Ashcroft, 56 F. App'x 803 (9th Cir. 2003); *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2002); *Dias*, 311 F.3d 456 (1st Cir. 2002); *Chambers*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya*, 291 F.3d 1116 (9th Cir. 2002).

related to the presumption of congressional intent underlying the bar against retroactivity." *Id.* at 389.

Instead, tracking the Third Circuit's approach with respect to IIRIRA's repeal of Section 212(c), the Fourth Circuit held that whether the immigrant was convicted by *way* of guilty plea or jury trial was irrelevant to the retroactivity inquiry. What is relevant, the court held, is that "IIRIRA has attached new legal consequences to the *conviction*." *Olatunji*, 387 F.3d at 396.

The Fourth Circuit in *Olatunji*, moreover, expressly recognized the need for this Court's intervention, explaining that this Court's precedent "has generated substantial confusion as to whether a party must prove some form of reliance," and that "confusion extends throughout the Courts of Appeals." *Olatunji*, 387 F.3d at 390. Indeed, the government itself, the Fourth Circuit noted, "vacillated in response to the pointed question of whether reliance remains a requirement." *Id.* at 391.

Stressing that "[r]etroactivity is a question of congressional intent," *Olatunji*, 387 F.3d at 389, the Fourth Circuit echoed the Third Circuit's judgment that making the application of a single statutory provision vary based on the reliance conduct of individuals is "unsupported and unsupportable," *Id.* at 394. "[T]here is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply" to pre-enactment events, the Fourth Circuit concluded. *Ibid.* "Anything more, in the face of complete congressional silence, is nothing but judicial legislation." *Ibid.*

In *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007), the Ninth Circuit adopted a different view of

the same provision, agreeing that it could in some cases have an impermissible retroactive effect but holding that immigrants "making a *Landgraf* retroactivity argument cannot prevail if they cannot plausibly claim that they would have acted differently if they had known about the elimination of [the] relief." *Id.* at 884 (quoting *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 939 (9th Cir. 2007)).

Indeed, disagreement and confusion over the role of reliance in retroactivity analysis pervade the interpretation of other immigration provisions as well. *See, e.g., Hernandez De Anderson*, 497 F.3d at 938 (noting, in the context of an analysis of INA Section 244(a)(2), that "*St. Cyr* has produced considerable disagreement among the courts of appeals concerning whether 'reasonable reliance' on pre-IIRIRA relief from deportation is a required element of a *Landgraf* claim to that relief and, if some form of reliance is required, what form it must take"); *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub, J., concurring) (noting, in the context of an analysis of INA Section 240A(d)(1), that "whether—and to what extent a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed.") (quoting *De Horta Garcia*, 519 F.3d at 666 (Rovner, J., concurring)).[5]

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[5] *See also, e.g., Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (INA Section 240A(d) not "impermissibly retroactive" because no reliance established); *Hernandez v. Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) ("Because our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply, *[Karageorgious v.*

The questions presented thus are of wide-ranging and enduring importance both within and beyond the Section 212(c) context, and the widespread confusion in the law of the circuits warrants this Court's review.

2. *This Case Properly Presents the Question for Decision.*

Unlike prior petitions raising the question of Section 304(b)'s application to pre-enactment trial convictions, for which this Court's review has been denied, the present case provides a proper and timely vehicle for resolving the entrenched and expanding circuit conflict.

First, early petitions, some filed in the immediate aftermath of this Court's decision in *St. Cyr*, were premature.[6] There was no circuit split at all until

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Ashcroft, 374 F.3d 152 (2d Cir. 2004)] and *Jimenez-Angeles* are distinguishable."); *Zuluaga*, 523 F.3d at 373, 375 (2d Cir. 2008) (concluding that INA Section 240A(d)(l) "would not have an impermissible retroactive effect if applied to [petitioner's] 1995 offense" without considering reliance and noting that "[o]ur decision remains sound when reasonable reliance is taken into consideration"); *Hernandez De Anderson*, 497 F.3d at 941 (adopting the Tenth Circuit's objective reliance standard for) INA Section 244(a)(2) retroactivity analysis and "hold[ing] that individuals demonstrate reasonable reliance on pre-IIRIRA law and plausibly claim that they would have acted * * * differently if they had known about the elimination of [the] relief if it would have been objectively reasonable under the circumstances to rely on the law at the time") (internal quotation marks omitted); *see generally Rodriguez v. Peake*, 511 F.3d 1147, 1155 (Fed. Cir. 2008) ("[T]he D.C. Circuit appears to view the familiar considerations [of fair notice, reasonable reliance, and settled expectations] as akin to a tiebreaker in close cases.") (internal quotation marks omitted).

[6] *See, e.g., Garcia-Zavala v. Ashcroft*, 543 U.S. 813 (2004); *Binns v. Ashcroft*, 540 U.S. 1219 (2004); *Lawrence v. Ashcroft*,

2004 when the Second Circuit adopted a subjective reliance standard, and the conflict became acute only in 2007, after the Tenth Circuit adopted its "objective reliance" standard, the Fifth Circuit adopted the subjective reliance standard, and the Third Circuit held that *St. Cyr* applies to all cases involving pre-1996 convictions. *Hem*, 458 F.3d at 1197; *Carranza-de Salinas*, 477 F.3d at 208; *Atkinson*, 479 F.3d at 230. Now, with the Eighth Circuit's adoption of the Third Circuit approach, the courts have fractured even further, and *Olatunji* establishes that the split is expanding into new contexts.

Second, the Government has previously opposed certiorari on the ground that courts should be given an opportunity to reconsider their positions in light of regulations issued in 2004.[7] But over five years after the regulations were issued, the circuit conflict shows no signs of abating and, in fact, has worsened significantly.[8]

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540 U.S. 910 (2003); *Dias v. INS*, 539 U.S. 926 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

[7] *See, e.g.*, Brief for the Respondent in Opposition at 14-15, *Rodriguez-Zapata v. Gonzales*, 127 S. Ct. 2934 (2007) (No. 06-929), 2007 WL 1406224 (arguing that it would be "premature" for the Court to consider whether the rule in *St. Cyr* extends to immigrants convicted after trial because the Attorney General's final rule on the subject, *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57, 826 (2004)), had only been considered by "a few courts"); Brief for the Respondent in Opposition at 9, *Hernandez-Castillo v. Gonzales*, 127 S. Ct. 40 (2006) (No. 05-1251), 2006 WL 2136237 (same).

[8] Indeed, several circuits have considered the regulations and expressly declined to change their positions. *See, e.g.*, *Nadal-Ginard*, 558 F.3d at 70 n.8 (1st Cir. 2009); *Hernandez-Castillo v. Moore*, 436 F.3d at 519 (5th Cir. 2006).

Third, beyond the absence of a clear circuit split and the uncertain effect of the regulations, other petitions were plagued by vehicle problems. In some, there were serious questions whether the petitioner met the criteria for being considered for discretionary relief under Section 212(c), making the question presented potentially irrelevant to the petitioner's entitlement to relief,[9] and in others, the question was not squarely presented or the focus of the petition.[10]

This case suffers from none of those difficulties. It squarely presents the question of whether defendants convicted of a deportable offense after trial prior to the repeal of Section 212(c) are eligible for relief under that provision, and there is no dispute that petitioner would otherwise qualify for relief. Indeed, she is a strong candidate for relief, having served her sentence for a single crime committed over sixteen years ago, having spent the past eleven years as a productive and law-abiding member of her commu-

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[9] *See, e.g., Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008), *cert denied sub nom., Cruz-Garcia v. Holder*, No. 08-878 (2009); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007), *cert denied sub nom., Zamora v. Mukasey*, 128 S. Ct. 2051 (2008); Brief for the Respondent in Opposition at 6-7, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) (No. 07-820), 2008 WL 809105 (arguing petition does not squarely present the question of the retroactive effect of Section 212(c)'s repeal); *Thom*, 369 F.3d at 164 n.8 (noting that five-year bar might "independently preclude [petitioner] from 212(c) eligibility").

[10] *See, e.g., Saravia-Paguada v. Gonzales*, 488 F.3d 1122 (9th Cir. 2007), *cert denied sub nom., Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008); Brief for the Respondent in Opposition at 7-8, *Saravia-Paguada v. Mukasey*, 128 S. Ct. 2499 (2008) (No. 07-866), 2008 WL 623189; Brief for the Respondent in Opposition at 12-15, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256 (discussing numerous other issues raised by petition).

nity, and having developed strong family ties to the United States, through her two children, and her husband who passed away of a heart attack five years ago, who are all citizens. *See St. Cyr*, 533 U.S. at 296 (noting that "a substantial percentage" of applications for Section 212(c) relief were granted when it was available).

Fourth, the government has argued in the past that cases involving immigrants who make no claim of actual reliance do not merit review because they do not implicate the conflict between courts requiring subjective and objective reliance. *See, e.g.*, Brief for the Respondent in Opposition at 11-12, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256. But that argument simply begs the question of whether reliance is an indispensable prerequisite to establishing that a statute has retroactive effect—a predicate question to that which the government poses and on which the courts are deeply divided. Six circuits have held that reliance is entirely irrelevant—the Third and Eighth Circuits because the repeal of Section 212(c) has a retroactive effect even in the absence of reliance, and the First, Fourth, Seventh, Ninth, and Eleventh Circuits because they view *St. Cyr* as categorically limited to the plea-bargain context. Three other circuits—the Second, Fifth, and Tenth—hold precisely the opposite, making reliance an indispensable prerequisite to relief under that provision. Lastly, the Second Circuit claims to hold subjective reliance as their standard, although plainly stated that they do not always require reliance, whether subjective or objective. Moreover, confusion over the indispensability of reliance *vel non* has generated confusion in immigration law beyond the Section 212(c) context, as *Olatunji* illustrates.

In short, the division in the circuits on the role of reliance in retroactivity analysis is expanding. Contrary to the government's prior arguments, that conflict shows no evidence of dissipating in the Section 212(c) context and, in fact, is expanding into new aspects of immigration law. Moreover, the government continues and will continue for years to initiate removal proceedings that implicate the Section 212(c) retroactivity question. This Court's resolution of the conflict thus would bring stability and uniformity to the law—to the benefit of courts, immigrants, and the government.

II. The Court Of Appeals' Decision Is Wrong.

The Second Circuit's decision also warrants review because it is wrong, contravening this Court's established jurisprudence in three significant respects.

First, the inquiry into whether IIRIRA Section 304(b)'s repeal of the Attorney General's waiver authority has retroactive effect entails a straightforward "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quoting *Martin*, 527 U.S. at 357-358) (internal quotation marks omitted). Here, IIRIRA attached a "new legal consequence[]" to Ms. Sanchez's pre-enactment conviction—the legal effect of the conviction now is "certain deportation" rather than "possible deportation." *Id.* at 325. In that respect, the repeal of the waiver provision is indistinguishable from the repeal of the affirmative defense in *Hughes*. While the defendant may not have prevailed in the defense even if it remained available, for those defendants with no other viable defense, the repeal meant the difference between "certain" and merely "possible" liability. That change,

the Court held, was sufficient to give the repeal retroactive effect. *Hughes*, 520 U.S. at 951-952.

To be sure, demonstrating reliance in prior decision-making could be one way of showing that a new legal consequence has attached to prior conduct. But nothing in this Court's articulation of the test for retroactivity mentions "reliance" or affords it the dispositive, yet contradictory weight the Second Circuit has given it. Again, the Second Circuit claims a reliance test, but by its own admission conceded that they "never stated that petitioners must show reliance in every case". *Zuluaga v. INS* at 375, n.4. Indeed, reliance is not even a required element for identifying *unconstitutional* retroactivity under the Ex Post Facto Clause. *See, e.g., Smith v. Doe*, 538 U.S. 84, 97 (2003) (identifying the traditional *Mendoza-Martinez* factors). There thus is no sound basis for the transcendence bestowed on that single factor by the Second Circuit and some of its sister circuits. To the contrary, both *Landgraf* and *Hughes* found retroactive effect in the absence of any evidence of reliance.[11]

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[11] *See Hughes*, 520 U.S. at 951-952 (holding that an amendment to the False Claims Act that eliminated a defense to *qui tam* suits had an impermissible retroactive effect without citing any evidence of reliance by the company); *Hem*, 458 F.3d at 1193 (Supreme Court's decision in *Hughes* was made "without even a single word of discussion as to whether Hughes Aircraft—or, for that matter, similarly situated government contractors—had relied on the eliminated defense to its detriment") (quoting *Olatunji*, 387 F.3d at 391); *Landgraf*, 511 U.S. at 282-283 & n.35 (amendment to Title VII that permitted recovery of compensatory and punitive damages for certain violations had retroactive effect because it attached a new legal consequence to past conduct, even though "concerns of unfair surprise and upsetting expectations [we]re attenuated" because "intentional

The Second Circuit ignored how IIRIRA significantly altered the legal consequence of Ms. Sanchez's conviction, focusing instead on her purported "decision" to go to trial rather than to plead guilty. In so doing, the Second Circuit violated its own precedent and summarily dismissed Ms. Sanchez's petition for review without issuing a substantive decision. But, again, nothing in the retroactivity test prescribed by this Court from *Landgraf* forward forbids consideration of the law's effect on a past conviction or criminal conduct. To the contrary, those are traditional foci of retroactivity analysis. *See Smith v. Doe*, *supra*. Moreover, the plain text of IIRIRA makes the "conviction" the operative act for depriving the immigrant of the previously available opportunity to seek a waiver of deportation. *See* 8 U.S.C. § 1229b(a)(3) (foreclosing relief for immigrants "convicted" of aggravated felonies). "Applying the familiar retroactivity analysis to the past event of conviction, rather than the past decision to go to trial, reveals that IIRIRA and AEDPA imposed an obvious additional legal consequence on those previously convicted of an aggravated felony, *i.e.*, certain, instead of possible, deportation." *Thom*, 369 F.3d at 167 (Underhill, J., dissenting).

Second, even if reliance were a critical element, there is every reason to believe that immigrants who chose to go to trial rather than accept plea bargains did so in reasonable reliance on the continuing

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employment discrimination" "ha[d] been unlawful for more than a generation"); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (holding that Section 101 of the Civil Rights Act of 1991 has retroactive effect because it "creates liabilities that had no legal existence before the Act was passed" without considering reliance).

availability of Section 212(c) relief. As this Court noted in *St. Cyr*, it is well-established that aliens charged with crime "factor the immigration consequences of conviction in deciding whether to plead *or* proceed to trial." 533 U.S. at 322 (emphasis added) (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999)). In fact, the immigration consequences of these convictions are so severe that the Court recently ruled that each defendant must be properly advised of the immigration consequences of a plea. *See Padilla v. Kentucky*, 555 U.S. ___ (March 31, 2010). The consequences of conviction thus can be weighed as much in deciding to reject as to accept a guilty plea. Prior to Section 212(c)'s repeal, immigrants could reasonably believe that going to trial was the best way to avoid deportation, when accepting a plea to a deportable defense would subject them to immediate risk of deportation; going to trial might avoid that prospect if the jury failed to convict; and even if the jury convicted, the immigrant would have no lesser right to apply for relief under Section 212(c) than she would if she had pled guilty. Similarly, individuals convicted after Congress foreclosed section 212(c) relief for those who served more than five years would have reasonably relied on the present state of the law in rejecting a plea bargain that required or risked a sentence that would render them ineligible under the 1990 statute.

Accordingly, there is no basis for the categorical rejection of *St. Cyr's* application to those convicted after trial. Nor does it make sense to require immigrants to prove actual, subjective reliance. The Court required no such individualized showing in *St. Cyr*, even though it is entirely possible that some immigrants would have pled guilty for reasons entirely unrelated to the availability of Section 212(c) relief

(especially those aliens whose equities made a waiver unlikely). Nor did the Court require courts to inquire into the minds of the defendants in *Landgraf* or *Hughes*. Furthermore, in practice, a subjective test is entirely unworkable given the rule against introducing plea offers into evidence, *see* Federal Rule of Evidence 410, the informality of such discussions in many state prosecutions, and the years if not decades that can elapse between the decision to go to trial and the federal government's commencement of removal proceedings.

Third, the Second Circuit's decision overlooks this Court's precedent holding that a single statutory provision cannot be construed to have different meanings based on the factual circumstances of the immigrant before the court. In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court held that the Immigration and Nationality Act's detention provision, 8 U.S.C. § 123 1(a)(6), must be given the same meaning when applied to excludable as well as deportable aliens. *Id.* at 378-381. Because the statutory text admitted of no distinction between those groups, the Court held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378. In so holding, the Court acknowledged that its prior decision limiting the scope of detention for deportable aliens in *Zadvydas v. Davis*, 533 U.S. 678 (2001), had reserved the question whether its holding would extend to excludable aliens. *Clark*, 543 U.S. at 378. But the Court explained that, once confronted with the question of the provision's application to excludable aliens, the absence of any textual distinction compelled the "same answer." *Id.* at 379.

Likewise here, the government's effort to defend and leave in place the factually variable retroactivity rules now applied by the courts of appeals simply rehearses its failed effort in *Clark* to give "the *same* [statutory] provision a different meaning when [different] aliens are involved." 543 U.S. at 380. Whether Section 304(b) attaches a new legal consequence to pre-enactment convictions is a question of statutory construction and, as in *Clark*, nothing in "the operative language" of that provision "differentiat[es]" the scope of its operation or the legal effect of the repeal on an immigrant's ability to seek previously available discretionary relief based on how an immigrant's conviction was obtained. *Id.* at 378.

While the reliance interests of those convictions obtained through guilty pleas certainly informed the Court's judgment in *St. Cyr*—just as the legal and constitutional interests of deportable aliens informed the Court's original decision in *Zadvydas*—having decided that Section 304(b) does not apply to pre-enactment convictions obtained by plea, "the same answer" must apply to convictions obtained by trial. *Clark*, 543 U.S. at 379. Not only do convictions obtained through trial commonly implicate the same type of reliance and other legal interests as guilty pleas, but beyond that, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications" might implicate different analyses. *Id.* at 380. "The lowest common denominator, as it were, must govern." *Ibid.* Thus *St. Cyr's* holding as a matter of statutory construction that Section 304(b) does not apply to a pre-IIRIRA conviction should control here because, whether obtained through plea or trial,

Section 304(b) attaches new legal consequences to pre-enactment convictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES H. KUCK, Esq.
Counsel of Record
DANIELLE M. CONLEY, Esq.
KUCK IMMIGRATION PARTNERS LLC
8010 Roswell Road, Suite 300
Atlanta, Georgia 30350
(404) 816-8611
CKuck@immigration.net

April 6, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Jan. 07, 2010]

09-2725-ag

MAYRA ISABEL JEREZ-SANCHEZ,
Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL, AND U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of January, two thousand ten,

Present: Guido Calabresi, Rosemary S. Pooler, *Circuit Judges*, Lawrence E. Kahn,* *District Judge*.

The Government moves for summary affirmance of a decision of the Board of Immigration Appeals ("BIA"). The Petitioner moves for stay of removal. Upon due consideration, it is hereby ORDERED that the Government's motion is construed as requesting summary denial of the petition for review and, as so

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* Lawrence E. Kahn, Senior Judge of the United States District Court for the Northern District of New York, sitting by designation.

construed, the motion is GRANTED and the petition for review is DENIED. *See Pillay v. INS*, 45 F.3d 14, 16-17 (2d Cir. 1995). It is further ORDERED that Petitioner's motion is DENIED as moot.

Because Petitioner is not eligible for relief under § 212(c) of the Immigration and Nationality Act due to her conviction for an aggravated felony after a jury trial, the BIA did not abuse its discretion in denying her special motion made pursuant to 8 C.F.R. § 1003.44. *See* 8 C.F.R. §§ 1003.44(c), 1212.3(f)(4); *see also Cyrus v. Keisler*, 505 F.3d 197, 201 (2d Cir. 2007) ("reopening removal proceedings on the basis of 8 C.F.R. § 1003.44 is not available to a petitioner ineligible for section 212(c) relief because 8 C.F.R. § 1003.44 by its terms allows reopening 'solely for the purpose of adjudicating the application for section 212(c) relief.'").

Due to a discrepancy between the Petitioner's papers and the BIA's records regarding Petitioner's name, the Clerk of the Court is instructed to amend the caption so that the name of the Petitioner appears as follows: "Mayra Isabel Jerez-Sanchez, also known as Mayra Isabel Jerez Farmer."

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: [Illegible]

APPENDIX B

[Logo] U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Kuck, Charles H., Esq.
Conley, Danielle M., Esq.
8010 Roswell Road, Suite 300
Atlanta, GA 30350

Office of the Chief Counsel –
USICE/DHS – Hartford, CT
AA Ribicoff Fed. Bldg. Courthouse
450 Main Street
Room 483
Hartford, CT 06103
(BIA Error)

Name: *F-JEREZ-SANCHEZ, MAYRA ISABEL
A034137-500

Date of this notice: 5/26/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

[Logo] U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

*F-JEREZ-SANCHEZ, MAYRA ISABEL
Was No Longer Detained
BIA Error
1908 GRIGG LANE
WAXHAW, NC 28173

Office of the Chief Counsel –
USICE/DHS - Atl.
USICE/DHS – Hartford, CT
AA Ribicoff Fed. Bldg. Courthouse
450 Main Street
Room 483
Hartford, CT 06103
(BIA Error)

Name: *F-JEREZ-SANCHEZ, MAYRA ISABEL
A034137-500

Date of this notice: 5/26/2009

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached

decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22401

Decision of the Board of Immigration Appeals

DATE: MAY 26 2009

File: A034 137 500 - Danbury, CT

In re: MAYRA ISABEL JEREZ-SANCHEZ

DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Charles H. Kuck, Esquire
Danielle M. Conley, Esquire

APPLICATION: Reopening

ORDER:

The respondent, a native and citizen of the Dominican Republic, moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen proceedings to apply for a waiver of deportation under former 212(c) of the Immigration and Nationality Act (1996), 8 U.S.C. § 1182(c). In our final decision, on March 5. 1999, we dismissed the appeal of the Immigration Judge's decision finding the respondent statutory ineligible for a waiver of deportation under former 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordering the respondent deported, because of a controlled substance law violation which was also an aggravated felony conviction. *See* former sections 241(a)(2)(A)(iii) and (B)(i) of the Act; Antiterrorism and Effective Death Penalty Act of 1996, Pub, L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d).

The instant motion once again argues the respondent should be eligible under section 212(c) of the Act, claiming the respondent was convicted in 1992. However, the record clearly indicates that the respondent was convicted after a trial, not by a plea of guilty (Exh. 2). Furthermore. in order to he considered for a "Special 212(c) Motion," this motion would have been due by April 26, 2005 (Exhs. 3-4). *See* 8 C.F.R. § 1003.22(h). The motion was not filed until April 15, 2009, and therefore is untimely. *See* 8 C.F.R. § 1003.2(b). No facts warranting an exception to this timeliness requirement have been argued or established. Insofar as the motion argues that the respondent's constitutional rights or privileges have been violated, we are unable to review this. We have long declared that we lack authority to rule on the constitutionality of the statutes we administer. *See, e.g., Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002). Accordingly, the motion is denied.

/s/ Edward R. Grant
THE BOARD

APPENDIX C

[Logo] KUCK CASABLANCA LLC
THE IMMIGRATION LAW FIRM

CHARLES H. KUCK
E-Mail: CKUCK@IMMIGRATION.NET

April 14, 2009

VIA FEDERAL EXPRESS

Board of Immigration Appeals
Clerk's Office,
5107 Leesburg Pike
Suite 2000
Falls Church, VA 22041

RE: Motion to Reopen Removal Proceedings
Respondent: Mayra Isabel JEREZ
FARMER/A034-137-500

Dear Sir or Madam:

We now represent the Respondent in her immigration matters and have included Form EOIR-27, the required $110 filing fee, and the Motion to Reopen Respondent's immigration proceedings.

In addition, we have included one additional copy of this submission along with a return Federal Express envelope. We ask that you please stamp the copy and return it to us for our records.

Thank you for your attention to this matter.

Very truly yours,

/s/ Charles H. Kuck
Charles H. Kuck

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB#1125-0005

Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals

I hereby enter my appearance as attorney or representative for, and at the request of, the following named person:

DATE (mm/dd/yy): 04/14/2009

NAME: Mayra I GUERTZ FARMER
(First) (Middle Initial) (Last)

ADDRESS: 1908 Gregg Lane
(Number and Street) (Apt. No.)

Waxhaw North Carolina 28173
(City) (State) (Zip Code)

ALIEN NUMBER(S) (List lead alien number and all family member alien numbers and names, if applicable. Continue on next page as needed.)
A034 137 500

For a disciplinary case, check box ☐ and write in case number in space above.

Please check one of the following:

☒ 1. I am a member in good standing of the bar of the highest court(s) of the following state(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia:

Full Name of Court	State Bar No. (If applicable)
GA, AZ, DC	GA 429840
GA	222750

(Please use space on reverse side to list additional jurisdictions.)

I ☒ am not (or ☐ am - explain fully on reverse side) subject to any order of any court or administrative agency disbarring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law and the courts listed above comprise all of the jurisdictions (other than federal courts) where I am licensed to practice law.

☐ 2. I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, so recognized by the Executive Office for Immigration Review pursuant to 8 C.F.R. § 1292.2 (provide name of organization and expiration date of accreditation):

☐ 3. I am a law student or law graduate, reputable individual, accredited official, or other person authorized to represent individuals pursuant to 8 C.F.R. § 1292.1 (explain fully on reverse side).

I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representation before the Board of Immigration Appeals. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE | LEGIBLE | DATE (mm/dd/yy): 04/14/2009

NAME OF ATTORNEY OR REPRESENTATIVE (type or print):
Charles H. Kuck / Danielle M. Conley
Kuck Casablanca LLC

ADDRESS: 8010 Roswell Rd., Suite 300, Atlanta, GA 30350, USA ☐ Check here if new address

PHONE NUMBER (with area code): (404) 816-8611

FAX NUMBER (with area code): (404) 816-8615

Form EOIR-27
Rev. May 2006

Proof of Service

I, Charles H. Kuck (Name) mailed or delivered a copy of the foregoing Form EOIR 27 on 04/14/2009 (Date mm/dd/yy)

to the DHS (U.S. Immigration and Customs Enforcement - ICE) at AA Ribicoff Fed. Bldg. Courthouse 450 Main St., Rm. 483, Hartford, CT 06103 (Number and Street, City, State, Zip Code)

X _____
Signature of Attorney or Representative

APPEARANCES - An appearance shall be filed on a Form EOIR 27 by the attorney or representative appearing in each appeal or motion to reopen or motion to reconsider before the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)), even though the attorney or representative may have appeared in the case before the Immigration Judge or the U.S. Citizenship and Immigration Services. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals. Thereafter, substitution or withdrawal may be permitted upon the approval of the Board of a request by the attorney or representative of record in accordance with *Matter of Rosales*, 19 I&N Dec. 655 (1988). Please note that appearances for limited purposes are not permitted. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). Further proof of authority to act in a representative capacity may be required.

REPRESENTATION - A person entitled to representation may be represented by any of the following:

(1) Attorneys in the United States as defined in 8 C.F.R. § 1001.1(f).

(2) Law students and law graduates not yet admitted to the bar as defined in 8 C.F.R. § 1292.1(a)(2).

(3) Reputable individuals as defined in 8 C.F.R. § 1292.1(a)(3).

(4) Accredited representatives as defined in 8 C.F.R. § 1292.1(a)(4).

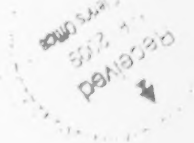
(5) Accredited officials as defined in 8 C.F.R. § 1292.1(a)(5).

All representatives must comply with the specific requirements to represent aliens before the Board of Immigration Appeals. For more information on the requirements, see 8 C.F.R. § 1292.1 and the particular subsections referenced above as applicable. Note that law students and law graduates must submit additional materials pursuant to 8 C.F.R. § 1292.1(a)(2).

FREEDOM OF INFORMATION ACT - This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is contained in 28 C.F.R. §§ 16.1 - 16.11 and appendices. For further information about requesting records from the EOIR under the Freedom of Information Act, see How to File a Freedom of Information Act (FOIA) Request With the Executive Office for Immigration Review, available through the EOIR's website at http://www.usdoj.gov/eoir/.

CASES BEFORE THE EOIR - Automated information about cases before the EOIR is available by calling 1-800-898-7180.

ADDITIONAL INFORMATION:



(Please attach additional sheets of paper if necessary.)

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is six (6) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

Form EOIR - 27
Rev. May 2008

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of	) IN DEPORTATION
Mayra Isabel JEREZ FARMER	) PROCEEDINGS
	) A034-137-500
Respondent	)

RESPONDENT'S MOTION TO REOPEN REMOVAL PROCEEDINGS
PURSUANT TO INS v. ST. CYR

Charles H. Kuck
Danielle M. Conley
Attorneys for Respondent
KUCK CASABLANCA LLC
8010 ROSWELL ROAD, SUITE 300
ATLANTA, GEORGIA 30350
(404)-816-8611

Ms. Mayra Isabel Jerez Farmer, through undersigned counsel, hereby moves the IMMIGRATION Court to reopen her removal proceeding pursuant 8 CFR Section 1003.44. Special Motion to Seek 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes before April 1, 1997, or in the alternative asks the court to reopen on its own motion through 8 CFR 1003.23 to adjudicate her application for relief from removal under Immigration and Nationality Act (INA) § 212(c).

FACTUAL BACKGROUND

Ms. Jerez Farmer is a citizen and national of the Dominican Republic. (See Respondent's Affidavit under Exhibit A). She was admitted to the United

States as a Lawful Permanent Resident on March 14, 1976. On September 16, 1994, Ms. Jerez Farmer was convicted of distribution of a controlled substance (cocaine) and was sentenced to five years and ten months confinement, which was reduced four years and ten months after participating in a drug program. (Id.). She was ordered to serve four years on probation subsequent to her release from prison. (Id.) Although Ms. Jerez Farmer had already completed prison sentence, Ms. Jerez Farmer was placed on an immigration detainer, remained confined under Immigration and Naturalization Service authority, and was ordered excluded on September 10, 1997. (See Exhibit B). Ms. Jerez Farmer appealed the Immigration Judge's decision to the Board of Immigration Appeals, and it was dismissed on March 5, 1999. On June 9, 2000, the Immigration and Naturalization Service released Ms. Jerez Farmer and placed her on an Order of Supervision. (Id.). Since her release, Ms. Jerez Farmer has reported promptly for the last eight years as required of her order of supervision. (see Exhibit C)

Ms. Jerez Farmer was married to Bruce A. Farmer, a United States citizen, for over twenty two years before he passed away. See Exhibit D, Exhibit E). She has maintained stable employment for Limited Brands/Victoria's Secret for the last eight years (See Exhibit F), has filed taxes for the last thirteen years (even while incarcerated) (See Exhibit G), and is the proud mother of two children. (See Exhibit H). Ms. Jerez Farmer's eldest child, Michael Ferreira, is currently serving his third tour with the U.S. Army and has been in the military for nine years. (See Exhibit I). Ms. Jerez Farmer's daughter, Ashley Briana Farmer, is a junior in college at Seton Hill University in Greensburg, Pennsylvania. (See Exhibit A). Ms. Jerez

Farmer also currently owns her own home, mortgage free, which she purchased with her husband on December 16, 2003, in Union County, North Carolina. (See Exhibit J).

ARGUMENT

MS. JEREZ FARMER IS PRIMA FACIA ELIGIBLE FOR 212(C) UNDER SECTION 1003.44 SPECIAL MOTION TO REOPEN

Under 8 CFR Section 1003.44 immigration crafted a manner by which those former Permanent Residents convicted of certain crimes and subject to final orders of deportation or removal could apply for 212 (c) relief. This regulation was promulgated in response to *INS v. St. Cyr* 121, S. Ct. 2271 (2001), where the Supreme Court held that aliens whose convictions occurred before April 24, 1996, the enactment date of Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 440(d), are eligible to have their petitions for relief under section 212 (c) adjudicated. Generally, *St. Cyr* cases arise during current court proceedings where Permanent Resident aliens facing deportation can apply for 212(c) relief if the conviction occurred prior to the April 24, 1996 date. However, the rationale for applying *St. Cyr* type relief also extends to those aliens ordered deported or removed who while eligible for 212(c) relief could not or did not take the opportunity to do so. Section 1003.44 Special Motion was thus created to give such Permanent Residents the ability to seek 212(c) relief.

Section 1003.44 Standard

The general standards that Ms. Jerez Farmer must meet to apply for Section 1003.44 relief are:

1. Ms. Jerez Farmer must submit a copy of the form I-191 application for Advance Permission to Return to Unrelinquished Domicile along with proof of payment.

2. Ms. Jerez Farmer must have been a Lawful Permanent Resident and now be subject to a final order of deportation or removal.

3. Ms. Jerez Farmer must have agreed to plead guilty, nolo contendere, or was convicted after jury trial, to an offense rendering the alien deportable or removable pursuant to a plea agreement made before April 1, 1997.

4. Ms. Jerez Farmer must have had seven ("7") consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal.

5. Ms. Jerez Farmer must otherwise be eligible to apply for section 212(c) relief under the standards that were in effect at the time the alien's plea was made, regardless of when the plea or jury conviction was entered by the court.

6. Ms. Jerez Farmer must not have been convicted of an aggravated felony, except as provided by 8 CFR 1212.3(f)(4).

7. Ms. Jerez Farmer must have made a special motion seeking such relief by April 26, 2005.

Ms. Jerez Farmer meets all of the above requirements except for number six ("6") which will be argued below, but regardless merits a favorable exercise of discretion in reopening her deportation proceedings.

1. Ms. Jerez Farmer has submitted Form I-191 to the District Director of the Atlanta Citizenship and

Immigration Service's Office with the filing fee of $545. (See Exhibit K).

2. Ms. Jerez Farmer became a Permanent Resident of the United States as of March 14, 1976. She continuously maintained such status until her order of deportation on September 10, 1997.

3. Ms. Jerez Farmer was convicted after a jury trial for the offense of distribution of a controlled substance, on September 16, 1994. The statute requires that the conviction have taken place before April 1, 1997.

4. Ms. Jerez Farmer, since her arrival from the Dominican Republic on March 14, 1976, traveled outside of the United States on three separate occasions between 1987 and 1990 which amounted to no more than one month total. She has maintained a stable residence within the United States since her arrival. The statute requires seven ("7") years of continual unrelinquished domicile prior to the deportation order. The deportation order was signed on September 10, 1997. At that date, Ms. Jerez Farmer had nearly 21 years of presence in the Unite States.

5. Ms. Jerez Farmer must be able to meet the 212(c) standards for relief that were in place at the time of her conviction. In 1995, 212(c) relief required seven ("7") years of continual physical presence. The applicant should also show positive factors such as family ties within United States, a positive history of employment, evidence of good moral character and rehabilitation. As set forth above, Ms. Jerez Farmer arrived lawfully in 1976, clearly establishing the continual physical presence requirement. Ms. Jerez Farmer also has family ties, at one time being married to a US Citizen who is now deceased, and having two ("2") U.S. citizen children with whom she is very

close. She is also gainfully employed and pays her taxes.

6. Ms, Jerez Farmer, through convicted of aggravated felony meets the exceptions captured in the exception as provided by 8 CFR 1212.3(f)(4). 8 CFR 1212.3(f)(4) provides in subsection (i):

> (i) An alien convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies, and
>
> (ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony conviction entered pursuant to a plea agreement that was made before November 29, 1990.

Ms. Jerez Farmer was convicted to a prison term of five years and ten months which was reduced to four years and ten months after completing a drug program (See Exhibit L) Ms. Jerez Farmer successfully completed the four year and ten month prison sentence and was placed on an immigration detainer by Immigration and Customs Enforcement ("ICE") who detained her until her release on June 9, 2000.

7. Ms. Jerez Farmer did not make a special motion seeking such relief by April 26, 2005. Ms. Jerez Farmer never received notice of the availability of such special motions up until now. (See Ms. Jerez Farmer's Affidavit Attached as Exhibit A). On September 24, 2004 the Department of Justice promulgated regulations that allows for 212(c) relief for all pending cases before the immigration court, but yet set an arbitrary 180 deadline of April 26, 2005, for those

seeking 212(c) relief who did not have the opportunity to do so in deportation proceedings but who otherwise would be able to just as those who comparably are in current immigration court proceedings. Such an arbitrary date sets an unfair and unconstitutional demarcation between those currently in immigration court proceedings and those unfortunate individuals who had their immigration court proceedings closed. Years from now, an individual can be put in immigration court proceedings and assert 212(c) relief (assuming that they meet the conviction date requirements), and yet a woman who was in immigration detention when the deportation order was entered against her is now barred by an arbitrary 180-day filing deadline.

However, though 212(c) relief still remains available to those aliens currently in deportation proceedings, immigration put an arbitrary sunset on Section 1003.44 Special Motion relief. This purported sunset provision established a new retroactive application of the 212(c) relief that was explicitly rejected under *St. Cyr*.

The United States Supreme Court express great disfavor toward the retroactive application of statutes. Indeed, the Court entertained a long-standing presumption against the retroactive application of any given statute. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). A statute may legitimately apply retroactively only if it is clear from the language of the provision that Congress intended for it to have retroactive application *Id.* at 268. This principle arises from the need allow persons to plan their conduct according to the legal consequences that are obtained at the time of decision and action and the unfairness of imposing additional burdens after the fact *Id.* at

270-71. Thus, if a statute does indeed purport to impose "new legal consequences to events completed before its enactment," *Id.* at 270, it must do so clearly and explicitly. In *St. Cyr*, the Supr me Court again reiterated the standard for retroactive application of AEDPA. *INS v. St Cyr*, 121 S. Ct. at 2271. They affirmed their decision in Landgraf and stated that AEDPA does not bar § 212 (c) relief for those aliens who would have had the relief available to them at the time of their conviction

The second prong of the *Landgraf* inquiry, whether the statute would impose new legal consequence upon acts completed prior to enactment, is clearly met in this case. Prior to the enactment of the AEDPA, Respondent had available to her the possibility of discretionary relief under INA § 212(c). It is no defense in this inquiry that what was denied Respondent is simply a possibility. Such substantive change, from discretionary relief to no relief whatsoever has been viewed a new legal consequence for the purposes of the *Landgraf* analysis. *INS v, St.* Cyr. 121 S Ct. at 2291, *quoting Landgraf*, 511 U.S. at 296 ("elimination of any possibility of § 212 (c) relief for people who entered plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability', in respect to transactions or considerations already past."); *Mayers v. U.S. Dep't of INS*, 175 F.3d 1289, 1303 ("To prohibit [from making [application for relief under § 212(c)] now arguably 'attaches a new disability' and imposes additional burdens on past conduct"); *Goncalves v. Reno*, 144 F.3d 110, 130 (1st Cir. 1998).

The Department of Justice incorporated *St. Cyr* type relief when it promulgated the Regulations at 8 CFR Section 1003, to codify *St. Cyr* relief for those

whose convictions arose before the enactment of AEDPA. However, the Regulations only capture half of the intent of *St. Cyr*. *St. Cyr* clearly intended to grant 212(c) relief to all those who entered into plea agreements before the enactment of AEDPA, not just to those who had not been placed in deportation proceedings yet. By placing a brief arbitrary time limit on those seeking 212(c) who had had their deportation proceedings closed, clearly places a new retroactive effect to AEDPA in clear violation of the holding in *St. Cyr*.

MS. JEREZ FARMER IS ELIGIBLE FOR RELIEF UNDER INA § 212 (c) EVEN THOUGH SHE IS CHARGED BY THE INS AS AN AGGRAVATED FELON

INA § 212 (c) relief is available to legal permanent residents whom lawfully resided in the United States for at least seven years and who can show rehabilitation. However, this relief from deportation was not available for legal permanent residents who were convicted of aggravated felonies if they actually served a term of imprisonment of five years or more. *Matter of Mann*, 16 I&N Dec. 581 (BIA 1978); *Matter of Wadud*, I&N Dec. 2980 (BIA 1984). Ms. Jerez Farmer was found guilty of distribution of a controlled substance. Ms. Jerez Farmer was ordered to serve a prison sentence of four years and ten months in jail. Since Ms. Jerez Farmer served less than 5 years in jail, she is eligible to be considered for 212(c) relief.

Therefore, Ms. Jerez Farmer is within the category of aliens eligible to file a motion to reopen so as to have their applications for § 212(c) relief adjudicated As stated in *St. Cyr*, the Supreme Court held that 212(c) should be available to aliens who were con-

victed prior to the enactment of AEDPA and IIRIRA. Ms. Jerez Farmer is eligible relief I under § 212(c) since she only served a sentence of four years and ten months in prison, which is less than the five-year bar to eligibility.

At the time the crime was committed and when judgment was rendered, Ms. Jerez Farmer had available to her relief from deportation in the form of INA § 212(c). Precedent cases from the Second Circuit Court of Appeals in 2004 and 2008 have held that one remains eligible for 212(c) relief even after a jury trial conviction. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004) [Found that person was convicted before AEDPA and gave up the right to apply *affirmatively* for INA §212(c) relief should not have statute abolishing relief applied against him under second prong of *Landgraf* concerning "fair notice, reasonable reliance and settled expectations']. The respondent in that case relied on the possibility that he would be able to file a stronger 212(c) case in the future once he was better able to show rehabilitation and distance from the date conviction.

Ms. Jerez Farmer also did not affirmatively file for 212(c) relief but because she was completely unaware that she would eventually be subject to deportation and was simply never provided with such an option. Her attorney at the time never informed her, and the judge never called into question her immigration status or any possible consequences to trial by jury versus a guilty plea. It was not until she was placed into immigration court proceedings that Ms, Jerez Farmer first learned of the 212(c) relief available at the time.

The Second Circuit reaffirmed their finding in *Restrepo* in a recent decision issued on April 23, 2008,

where the respondent was also convicted at trial and then subsequently sought 212(c) relief. *See Zutuaga v. INS*, 523 F.3d 365, 376 (2nd Cir. 2008). *This decision emphasizes the point that not only is one still eligible for 212(c) relief even after a jury convictions, but knowledge of the availability of 212(c) relief and reliance under Restrepo is not the only means by which one may be eligible for 212(c) relief after such a conviction. Id.* at 375, FN4. The Court specifically pointed out that, "[they] never stated that petitioners must show reliance in every case . . . the fact that one factor may be determinative in certain cases does not mean that it is the only determinative factor in every case. *Id.* The Opinion in this case makes a strong point stating that, "it makes no sense at all to ask whether an alien, in committing a drug trafficking offense, acted with 'an intention to preserve eligibility for relief under §212(c),' (*quoting* Rankine, 319 F.3d at 100), or in an effort to 'conform his or her conduct according to the availability of relief,' (quoting, St. Cyr, 229 F.3d at 420) (noting the absurdity of the notion that aliens committed drug crimes in reliance on the continued availability of discretionary relief). The Court concluded that although the respondent was not able to show a protectable reliance interest, this lack of reliance coupled with his jury trial conviction would not have precluded him from applying for 212(c) relief if he was otherwise statutorily eligible. *Id.*

The recent Second Circuit case law confirms that Ms. Jerez Farmer's jury trial conviction is not determinative or preclusive of her eligibility for 212(c) relief, and that the equities in her favor, namely her children, her home, payment of taxes, employment, and all other ties to the community, strongly support her eligibility for the relief sought.

CONCLUSION

Ms. Jerez Farmer respectfully requests that her deportation proceedings be reopened and remanded to the Immigration Judge for consideration on her application for INA section 212(c) relief from deportation.

Respectfully submitted this 14th day of April, 2009.

KUCK CASABLANCA LLC,

/s/ Charles H. Kuck
Charles H. Kuck, Esq.
Danielle M. Conley, Esq.
8010 Roswell Road, Suite 300
Atlanta, GA 30350)
(404) 816-8611

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of	) IN DEPORTATION
Mayra Isabel JEREZ FARMER	) PROCEEDINGS
	) A034-137-500
Respondent	)

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EXHIBIT K	Copy of Form I-191 Application and Proof of Payment
EXHIBIT L	Letter Confirming Completion of Drug Program

AFFIDAVIT

I Mayra Isabel Jerez Farmer, currently residing at 1908 Grigg Lane, Waxhaw, North Carolina 28173, under penalty of perjury, do hereby declare and swear the following to be true and correct to the best of my knowledge and belief.

My name is Mayra Isabel Jerez Farmer. I am a citizen of the Dominican Republic who was admitted to the United States as a Lawful permanent Resident on March 14, 1976. On September 16, 1994,I was convicted of distribution of a controlled substance (cocaine) and was sentenced to five years and ten months confinement. I participated in a drug program which reduced my sentence to four years and ten months confinement. I ended up serving a total of five years in prison because Immigration and Customs Enforcement placed an immigration detainer on me and did not pick me up immediately upon my release date. I have had no further trouble with the law since my release.

After I was placed on an immigration detainer, I was subsequently ordered excluded on September 10, 1997. On August 7, 2000, the Immigration and Naturalization Service released me and placed me on an Order of Supervision. Since my release, I have reported promptly for the last eight years as required by my Order of Supervision.

I have learned this year that I could have applied for what I now know is Cancellation of Removal relief because my criminal conviction was in 1994. I never knew that there was a time limit to me making the application. At the time the regulations were published to allow for one to apply for the Cancellation I was reporting under my Order of Supervision and no

one, including the immigration ion officials, informed me of the regulation. If I had known about this relief I would have done all that I could have done to apply for the relief.

I am now gainfully employed is a Sales position with Limited Brands. I was at one time married to a U.S. Citizen, Bruce Farmer. We began our relationship in 1986, married in 1994, and had one daughter together in addition to my older son from a previous relationship. My son is currently in the Armed Forces and stationed overseas in Iraq on his third tour of duty, and my daughter is a twenty year old junior in college at Seton Hill University in Greensboro, Pennsylvania. I think about the health and safety of my son every day until he comes home from his nine years of service in the U.S. Armed Forces. As for my daughter, I am so proud that she is such a bright, young girl obtaining her college education, and I currently do everything I can as a supportive parent to help her get through school, both emotionally and financially. I ask that you please reopen the Immigration Proceedings so that I can again obtain my Permanent Residency and look to my future with my children here in the United States.

Furthermore, the affiant sayeth not;

/s/ Mayra Isabel Jerez Farmer
Mayra Isabel Jerez Farmer

Date: April 8, 2009

CERTIFICATE OF ACKNOWLEDGMENT:

The foregoing instrument was acknowledged before me this 8th day of April, 2009 at [Illegible]

My Commission Expires: 4-18-2010

U.S. Department of Justice
Immigration and Naturalization Service

Order of Supervision

File No: A34 137 500

Date: August 7, 2000

Name: Mayra Isabel PEREZ Sanchez

On September 10, 1997, you were ordered
(Date of final order)

☒ Excluded or deported pursuant to proceedings commenced prior to April 1, 1997.

☐ Removed pursuant to proceedings commenced on or after April 1, 1997.

Because the Service has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:

☒ That you appear in person at the time and place specified, upon each and every request of the Service, for identification and for deportation or removal.

☒ That upon request of the Service, you appear for medical or psychiatric examination at the expense of the United States Government.

☒ That you provide information under oath about your nationality, circumstances, habits, associations, and activities and such other information as the Service considers appropriate.

☒ That you do not travel outside the control of the Newark District Office for more than 48 hours without first
(Specify geographic limits, if any)
having notified this Service office of the dates and places of such proposed travel.

☒ That you furnish written notice to this Service office of any change of residence or employment within 48 hours of such change.

☒ That you report in person on the first Tuesday of EACH MONTH to this Service office at:
NEWARK/Deportation Section, 970 Broad Street; Newark, NJ 07102
unless you are granted written permission to report on another date.

☒ That you assist the Immigration and Naturalization Service in obtaining any necessary travel documents.

☐ Other: _____

☐ See attached sheet containing other specified conditions. (Continue on separate sheet if required.)

1164-68 Bliss Road
Voorhees, NJ 08043
(856) 651-9260

31 RED GRANGE CIRCLE
SICKLERVILLE, NJ
08081
856-728-1212

J. O'Malley
(Signature of INS official)

Joseph O'Malley, Deportation Officer
(Print name and title of INS official)

Alien's Acknowledgment of Conditions of Release under an Order of Supervision

I hereby acknowledge that I have (read) (had interpreted and explained to me in the SPANISH language) the contents of this order, a copy of which has been given to me. I understand that failure to comply with these conditions may subject me to arrest, detention, or prosecution.

EXHIBIT C

J. O'Malley
(Signature of INS official serving order)

Mayra I. Perez
(Signature of alien)

(Date)

OFFICER MASON

Form I-220B (Rev. 4/1/97)N

000025

U.S. Department of Justice
Immigration and Naturalization Service

Order of Supervision

File No. A34 137 500

Date June 9, 2000

Name: Mayra Isabel JEREZ-Sanchez

On 09/10/97 (Date of final order), you were ordered

- [X] Excluded or deported pursuant to proceedings commenced prior to April 1, 1997.
- [ ] Removed pursuant to proceedings commenced on or after April 1, 1997.

Because the Service has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:

- [X] That you appear in person at the time and place specified, upon each and every request of the Service, for identification and for deportation or removal.
- [X] That upon request of the Service, you appear for medical or psychiatric examination at the expense of the United States Government.
- [X] That you provide information under oath about your nationality, circumstances, habits, associations, and activities and such other information as the Service considers appropriate.
- [X] That you do not travel outside The control of The Boston District Office (Specify geographic limits, if any) for more than 48 hours without first having notified this Service office of the dates and places of such proposed travel.
- [X] That you furnish written notice to this Service office of any change of residence or employment within 48 hours of such change.
- [X] That you report in person on the first Mon day of each month to this Service office at Deportation Section, 450 Main St., Rm. 511, Hartford, CT 06103 (860) 240-3012 unless you are granted written permission to report on another date.
- [X] That you assist the Immigration and Naturalization Service in obtaining any necessary travel documents.
- [ ] Other:

- [ ] See attached sheet containing other specified conditions (Continue on separate sheet if required)

28 Briarwood Drive
Voorhees, NJ 08043
(856) 346-1237

(Signature of DHS official)
Michelle Vetrano, Deportation Officer
(Print name and title of DHS official)

Alien's Acknowledgment of Conditions of Release under an Order of Supervision

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English) the contents of this order, a copy of which has been given to me. I understand that failure to comply with the terms [illegible] subject me to a fine, detention, or prosecution.

EXHIBIT 1 B

(Signature of DHS official serving notice)

x Mayra Jerez (Signature of alien)

06/09/2000 (Date)

Form I-220B (Rev. 4/1/97)N

000024

9/5/00	Reported PB
10/3/2000	[Illegible]
11/7/2000	Reported. PF Next Report Date: 12/5/2000 P.F
12/5/2000	Reported KW
1/2/2001	Reported SM Next Report Date: 2/8/2001 SM
2/6/2001	Reported PF Next Date: 3/6/2001
3/6/2001	Reported PF Next Date: 4/6/2001 PF
4/3/2001	Reported [Illegible] Next date: 5/8/2001
5/1/2001	Reported PF Next Date: 6/5/2001
6/5/2001	Reported PF Next Date: 7/3/2001
7/3/2001	Reported KW Next Date 8/7/2001
8/7/2001	Reported PF Next Date: 9/04/2001
9/4/2001	Reported JHF Next Date: 10/9/2001
10/9/2001	Reported SM Next Date: 11/6/2001
11/6/2001	Reported KW Next Date 12/4/2001
12/4/2001	Reported KW Next Date 1/14/2002
1/14/2002	Reported SM Next Date 2/12/2002
2/5/02	Subject Reported KW
4/02/02	Subject Reported. Next Date: May 07, 2002 PF
5/7/02	Subject Reported. Jul. 9, 2002 KW
7/9/02	Subject Reported. Next Date: 9/3/02 KW
9/13/02	Subject Reported. Next Date: 11/5/02 SM

7/3/00: Appeared. To mail [Illegible] passport to INS by 7/13/00. SM

8/7/00: Appeared. New address provided:

1164-08 Bibbs Rd.
Vorhees, NJ 08403
Tel # 856-651-9260

11/05/02	[Illegible] Next Date 12/03/02 at 1000 am
12/03/02	PL SDDO/CLT Next Date 01/07/03 at 1000 am
1-7-03	[Illegible] Next Date 2-4-03 at 1000 am
2/4/03	[Illegible] Next Date 3-4-03 at 1000 am
3/4/03	[Illegible] Next Date 4/1/03 @ 1000
04/01/03	[Illegible] Next Date 06/03/03 at 1000 am
6/3/03	[Illegible] Next Date 10/07/03 at 1000 am
10/7/03	[Illegible] 02/03/04 at 1000 am
03/02/04	[Illegible] 09/07/04 at 1000 am
9/7/04	PL SDDO/CLT Voice Recognition to report by phone every 6 months 3-1-05
9/1/05	Thurs. Sept. 1st 9:30 am
Sept 1, 2006	10:04 Complete 3/1 next appt. complete 10:10 am March 1 9:56 am 2008

TELEPHONIC REPORTING INFORMATION and AGREEMENT

Date: 9/7/04

To: Jerez Sanchez, Mayra Isabel

As an enrollee in the Immigration and Customs Enforcement (ICE) office of Detention & Removals (DRO) Voice Reporting program, you are required to report into the automated monitoring system every 6 months.

The day you are required to report in appears on this information sheet. You are required to call in to the system from phone number 704 243-1100 unless pre-authorized by your DHS officer. Failure to report at the pre-determined time or call from an unapproved phone number could result in a sanction determined by your officer.

TELEPHONIC REPORTING PROCEDURES

The MSR system is an automated telephone reporting System. You are

1. required to call the system every 6 months starting on 3/1/05
2. Call the MSR System at 1-800-838-7002
3. The system will ask you for your Department ID number. Enter your Department ID Number: 4#
4. Press 1 for enrollee.
5. Enter your Enrollee in number (A number): 34-137-500
6. The system will ask you to respond to a series of questions: press 1 for yes or 2 for no.

7. If you respond with a 1 the system will ask you for your new information. Speak clearly your new information into the telephone handset.

8. After speaking your new information, press the * sign on your telephone.

9. The system will then proceed to the next question.

10 Once the system completes the questions, the system may make an announcement.

11. After completion of any announcement, you may hang up the phone.

TELEPHONIC REPORTING AGREEMENT

1. I agree not to have the call block feature on the line that I will be using during my voice reporting program.

2. I agree to report any phone problems (outages) to my DHS officer as soon as they are known.

3. I agree to keep a working telephone number during the entire term of the voice reporting Program.

4. I understand and agree that all telephone calls from the monitoring center to my residence will be tape-recorded by the monitoring center contractor.

I acknowledge that I have read (or have had read to me) these instructions, and understand them.

/s/ [Illegible]
Participant Signature/Date

/s/ [Illegible] 9/7/04
DHS Officer/Date

11/05/02	[Illegible] Next Date 12/03/02 at 1000 am
12/03/02	PL SDDO/CLT Next Date 01/07/03 at 1000 am
1-7-03	[Illegible] Next Date 2-4-03 at 1000 am
2/4/03	[Illegible] Next Date 3-4-03 at 1000 am
3/4/03	[Illegible] Next Date 4/1/03 @ 1000
04/01/03	[Illegible] Next Date 06/03/03 at 1000 am
6/3/03	[Illegible] Next Date 10/07/03 at 1000 am
10/7/03	[Illegible] 02/03/04 at 1000 am
03/02/04	[Illegible] 09/07/04 at 1000 am
9/7/04	PL SDDO/CLT Voice Recognition to report by phone every 6 months 3-1-05
9/1/05	Thurs. Sept. 1st 9:30 am
Sept 1, 2006	10:04 Complete 3/1 next appt. complete 10:10 am March 1 9:56 am 2008
11-3-08	[Illegible]—Next report date March 3/5/09
1/6/09	9:35 Am

ESR Participant

[Logo] U.S. Immigration
and Customs Enforcement

February 26, 2008

MAYRA ISABEL JEREZ SANCHEZ

1908 GRIGG LANE

WAXHAW, NC 28173

Dear Mayra Isabel Jerez Sanchez:

Please be advised that your Immigration Status Case Management responsibility has been transferred to G4S Justice Services. As a condition of your Immigration case, you will be required to report to the G4S office for program orientation. The G4S office is located at:

4701 Hedgemore Dr, Suite 820, Charlotte NC 28209

At your initial meeting with G4S staff, you will attend a program orientation at which time you will be given instructions on your reporting responsibilities to ICE and G4S.

You must contact the G4S office within 7 days of receipt of this letter to schedule your orientation appointment. If you do not call G4S to schedule an appointment before this time, you will be contacted by a G4S Supervision Specialist and ICE will be notified as well

To schedule your appointment, please contact the G4S Charlotte office at 704-672-9185, Monday through Friday, 8:00am to 5:00pm.

If you have any questions regarding G4S Justice Services or the transfer of your case, please contact me at (704) 672.6936.

Thank you,

/s/ D. Kunde
D. Kunde

Deportation Officer
U.S. Immigration and Customs Enforcement
Detention & Removal Operations
Charlotte, North Carolina

ESR Participant Code of Conduct [Logo]

Participant

First Name: Mayra Isabel Alien #: 34137500

Last Name: Jerez Sanchez DOB: 5/12/1956

Gender. Female

Country of Citizenship: Dominican Republic

Address: 1908 Grigg Lane,
Waxhaw, NC 28173

Supervision Case Specialist: Rosa Ramirez

1. I will comply with the terms of my supervision and electronic monitoring. I understand that if I fail to comply with them it may result in a change in my conditions of supervision or an detention by ICE.

2. I will be truthful in all my dealings with the supervision staff at G4S and with all my interactions in Court and with the ICE Officers.

3. I will not assault or be aggressive towards any of the G4S employees supervising me on the ESR program and I will not assault or be aggressive towards any other individuals at the ESR office. I understand that assault or threatening behavior will result in law enforcement being called and I may be arrested.

4. I will not assault or be aggressive towards any G4S employee that may visit me at my residence. I understand that assault or threatening behavior will result in law enforcement being called and I may be arrested.

5. I will allow G4S Supervision Specialists into my home for the purpose of inspecting my electronic monitoring equipment (If applicable), and any other supervision duty that may arise.

6. I will not offer any gifts or financial inducements to G4S staff.

7. I will notify G4S immediately if my circumstances change, eg. change of address, loss of sponsor, change in marital/family status, or any other emergencies that may arise.

8. I will ensure that all documentation for courts and for my country's embassy/consulate is provided on a timely basis and completed accurately.

I acknowledge that I have read (or have had read to me) this "Code of Conduct" and understand its contents.

Signed: [Illegible] Date: [Illegible]

(Participant)

Signed: [Illegible] Date: 3/11/08

(Supervision Specialist)

Enhanced Supervision Reporting

Appointment Card

Participant Name: Mayra Isabel Jerez Sanchez

Supervision Case Specialist Rosa Ramirez

Office: Charlotte

Telephone number: 704-672-9185

Next ESR (G4S) appointment: 5/7/08

Next EOIR (Court) appointment: None

Next DRO (ICE) appointment: 5/7/08.

Court location: ICE/DHS Office

Participant Signature/Date: Mayra Jerez

Supervision Specialist Signature/Date: 3/11/08

5/7/08 NSB [Illegible] next date [Illegible]

8/6/08 NSB next date 11/3/08

11/3/08 /s/ [Illegible] Represented @

Enhanced Supervision Reporting

Appointment Card

Participant Name: Mayra Isabel Jerez Sanchez

Alien # 34137500

Supervision Case Specialist Rosa Ramirez

Office: Charlotte

Telephone number: 1800-757-2953 Ex 4281 or
Cell 704-369-4631

Next ESR (G4S) appointment: Office visit: 11/17/08
9.00 AM

Next EOIR (Court) appointment: None

Next DRO (ICE) appointment:

location: G4S Office 4701 Hedgemore Dr,
Charlotte NC 28079

DHS/ICE 6130 Tyvola Center Drive,
Charlotte NC 28217

Participant Signature/Date: Mayra Jerez

Supervision Specialist Signature/Date: 9/17/08

Enhanced Supervision Reporting

Appointment Card

Participant Name: Mayra Isabel Jerez Sanchez

Alien # 34137500

Supervision Case Specialist Rosa Ramirez

G4S Office: Charlotte

Telephone number: 1800-757-2953 Ex 4281 or
Cell 704-369-4631

Next ESR (G4S) appointment: Office visit: 11/17/08
9.00 AM
Initial Home visit: None

Next DRO (ICE) appointment: 3/2009

Next EOIR (Court) appointment: None

Next Crime Court Appointment: None

location: G4S Office 4701 Hedgemore Dr,
Charlotte NC 28079

DHS/ICE 6130 Tyvola Center Drive,
Charlotte NC 28217

EOIR(Court) 5701 Executive Center Suite
400, Charlotte, NC 28212

Participant Signature/Date: Mayra Jerez

Supervision Specialist Signature/Date: 11/17/08

Enhanced Supervision Reporting

Appointment Card

Participant Name: Mayra Isabel Jerez Sanchez

Alien # 34137500

Supervision Case Specialist Rosa Ramirez

G4S Office: Charlotte

Telephone number: 1800-757-2953 Ex 4281 or
Cell 704-369-4631

Next ESR (G4S) appointment: Office visit: 03/20/09
9.00 AM
Initial Home visit: unannounced

Bring your passport

Next DRO (ICE) appointment: 3/5/2009 Time: 8 AM

Next EOIR (Court) appointment: None Time: ___

Next Crime Court Appointment: None Time: ____

location: G4S Office 4701 Hedgemore Dr,
Charlotte NC 28079

DHS/ICE 6130 Tyvola Center Drive,
Charlotte NC 28217

EOIR(Court)- 5701 Executive Center Suite
400, Charlotte, NC 28212

Participant Signature/Date: Mayra Jerez

Supervision Specialist Signature/Date: 11/17/08

Original

MARRIAGE CERTIFICATE

I (The Rev.) [Illegible] hereby certify that on the
[Illegible] day of May A.D. 1994
at Philadelphia, Pennsylvania,
[Illegible] Farmer and Myra Jerez
were by me united in marriage
in accordance with license
issued by the Clerk of the Orphans Court
Division of the Court of Common Pleas of
Philadelphia County, Pennsylvania

Signed (The Rev.) [Illegible]
Address 222 [Illegible] Drive
Numbered D- 44518 Elkins Park, PA 19117

CERTIFICATION OF VITAL RECORD

STATE OF NORTH CAROLINA

UNION COUNTY

OFFICE OF REGISTER OF DEEDS

CERTIFICATE OF DEATH Book 100 Page 42

BRUCE ALBERT PARMER M 7 8 2005

202-44-1376 48 3 25 1957 Tuscarora, Pa

1908 Grigg Lane Waxhaw Yes Union

Married Mayra Jones Francis Adrian Insurance Ind

NC Union Waxhaw 1908 Grigg Lane

Yes 28173 Black 18

Francis A. Parmer Gwendolyn Jones

Mayra Parmer 1908 Grigg Ln Waxhaw, NC 28173

Bookkeeper Tyro

No

7/8/05

Dr. David Miller, 4501 Cameron Valley Pkwy, Chlt., NC 28211

Berlin Cemetery Berlin, New Jersey

Pa 19401

Jackson Funeral Home 1020 DeKalb St Clinton Jackson FD014806

Jeff Wallace FSL2505

Book 100 Page 42

This is to certify that this is a true and correct reproduction or abstract of the official record filed in this office.

Crystal D. Crump

Register of Deeds

Union County

090-643076

Witness my hand and official seal this the 28th day of July 20 05

Deputy/Assistant Register of Deeds

EXHIBIT E

000041

To whom this may concern, Mayra has been with our company for 8 years! She is a hard worker and an asset to our team. Great moral character.

674-4409

VSS 1334

/s/ [Illegible]_____
Store Manager

CO LOCATION DEPT 078578 078059
PAY 01334 01

VICTORIA'S SECRET

Victoria's Secret Stores LLC
Four Limited Parkway
Reynoldsburg, OH 43068

Employee ID: 000001345S8

Exemptions Addl Fed Addl S
Fed: N 0
RC: N 0

Earnings Statement

Page 001 of 001

Period Ending	03/21/2009
Advice Date	03/27/2009
Advice Number	0001086766
Batch Number	BPDRH4000490

MAYRA JEREZ
1908 Grigg Ln
Waxhaw, NC 28173

Earnings	Rate	Hours	This Period	Year-to-Date
Customer Sal	12.5000	48.92	811.50	3410.49
Regular	12.5000	20.91	261.04	2221.39
Training 1 2			0.00	54.49
Holiday Work			0.00	92.98
Overtime			0.00	69.74
Project Hour			0.00	54.95
Store Closed			0.00	31.73

Other Benefits and Information	This Period	Year-to-Date
Excluded from Taxable Wages		
Fed Taxable Wages	873.14	5930.78

Deductions Statutory

Fed Withholding	20.74	350.65
Fed MED/EE	12.66	86.11
Fed OASDI/EE	54.13	368.20
NC Withholding	49.00	331.00

Distribution Summary

Trans	Type	Account	Amount
Deposit	Chk		736.01
Net Check			0.00

Other Deductions

Message

Notice a decrease in your federal tax?
It's likely due to the new stimulus package

Brand Discount Card

Victoria's Secret Stores, LLC
Cross Brands Discount: 201
Expires 04/11/2009 EMP ID 100134554
MAYRA JEREZ

VICTORIA'S SECRET

Victoria's Secret Stores, LLC
Four Limited Parkway
Reynoldsburg, OH 43068

Advice Number: 0001086766
Advice Date: 03/27/2009

Deposited to the account of — Amount
MAYRA JEREZ Checking 736.01

THIS IS NOT A CHECK

NON-NEGOTIABLE

VICTORIA'S SECRET

THIS CERTIFICATE OF RECOGNITION
IS PRESENTED TO

Mayra Farmer

IN APPRECIATION FOR

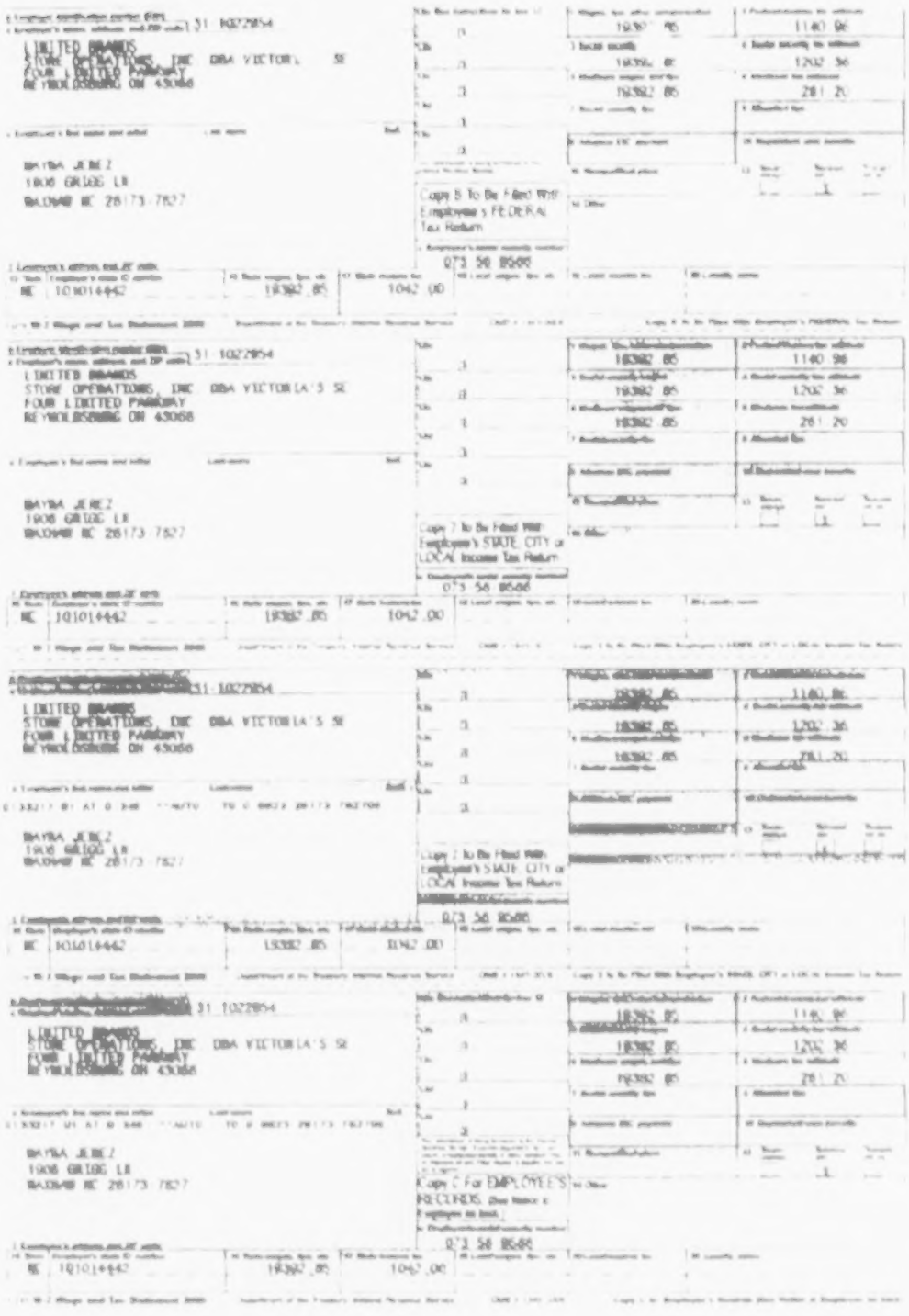
5 YEARS

OF DEDICATEED SERVICE AND

COMMITMENT TO OUR COMPANY

/s/ LEN SCHLESINGER
LEN SCHLESINGER
VICE-CHAIRMAN AND COO

Limitedbrands



000045

Form 1040 — Department of the Treasury—Internal Revenue Service

U.S. Individual Income Tax Return

(99) IRS Use Only—Do not write or staple in this space.

For the year Jan. 1–Dec. 31, 2008, or other tax year beginning ____ 2008, ending ____ 20__

OMB No. 1545-0074

Label (L A B E L H E R E)
Use the IRS label. Otherwise, please print or type.

MAYRA I JEREZ
1908 GRIGG LN
MATHAW, NC 28173

Your social security number: 073-58-9588

Spouse's social security number:

Presidential Election Campaign — Check here if you, or your spouse if filing jointly, want $3 to go to this fund (see page 14) ▶ ☐ You ☐ Spouse

Filing Status (Check only one box.)
1 ☐ Single
2 ☐ Married filing jointly (even if only one had income)
3 ☐ Married filing separately. Enter spouse's SSN above & full name here. ▶
4 ☒ Head of household (with qualifying person). (See page 15.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶
5 ☐ Qualifying widow(er) with dependent child (see page 16)

Exemptions
6a ☒ Yourself. If someone can claim you as a dependent, do not check box 6a. — Boxes checked on 6a and 6b: 1
b ☐ Spouse
c Dependents:

(1) First name / Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) ✓ if qualifying child for child tax credit (see page 17)
ASHLEY FARMER	143-86-9207	DAUGHTER	

No. of children on 6c who: lived with you: 1; did not live with you due to divorce or separation: ____; dependents on 6c not entered above: ____
If more than four dependents, see page 17.
Add numbers on lines above ▶ 2
d Total number of exemptions claimed

Income (Attach Form(s) W-2 here. Also attach Forms W-2G and 1099-R if tax was withheld.)

7	Wages, salaries, tips, etc. Attach Form(s) W-2	7	19,393.
8a	Taxable interest. Attach Schedule B if required	8a	30,940.
b	Tax-exempt interest. Do not include on line 8a (8b: 1,433.)		
9a	Ordinary dividends. Attach Schedule B if required	9a	3,619.
b	Qualified dividends (see page 21) (9b: 2,931.)		
10	Taxable refunds, credits, or offsets of state and local income taxes (see page 22)	10	51.
11	Alimony received	11	
12	Business income or (loss). Attach Schedule C or C-EZ	12	
13	Capital gain/(loss). Attach Sch D, if not required, check here ▶ ☐	13	10,672.
14	Other gains or (losses). Attach Form 4797	14	
15a	IRA distributions (15a: ____) b Taxable amt	15b	
16a	Pensions and annuities (16a: ____) b Taxable amt	16b	
17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E	17	
18	Farm income or (loss). Attach Schedule F	18	
19	Unemployment compensation	19	
20a	Social security benefits (20a: ____) b Taxable amt	20b	
21	Other income. List type and amount (see page 28)	21	
22	Add the amounts in the far right column for lines 7 through 21. This is your total income ▶	22	64,683.

If you did not get a W-2, see page 21.
Enclose, but do not attach, any payment. Also please use Form 1040-V.

Adjusted Gross Income

23	Educator expenses (see page 28)	23	
24	Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ	24	
25	Health savings account deduction. Attach Form 8889	25	
26	Moving expenses. Attach Form 3903	26	
27	One-half of self-employment tax. Attach Schedule SE	27	
28	Self-employed SEP, SIMPLE, and qualified plans	28	
29	Self-employed health insurance deduction (see page 29)	29	
30	Penalty on early withdrawal of savings	30	
31a	Alimony paid b Recipient's SSN ▶	31a	
32	IRA deduction (see page 30)	32	
33	Student loan interest deduction (see page 33)	33	
34	Tuition and fees deduction. Attach Form 8917	34	4,000.
35	Domestic production activities deduction. Attach Form 8903	35	
36	Add lines 23 through 31a and 32 through 35	36	4,000.
37	Subtract line 36 from line 22. This is your adjusted gross income ▶	37	60,683.

EXHIBIT 1 Gn

Form 1040 (2008) MAYRA I JEREZ 073-58-9588 Page 2

Tax and Credits	38	Amount from line 37 (adjusted gross income)	38	60,683.
	39a	Check { You were born before January 2, 1944, Blind / Spouse was born before January 2, 1944, Blind } Total boxes checked ▶ 39a		
	b	If your spouse itemizes on a separate return or you were a dual-status alien, see page 34 & check here ▶ 39b		
Standard Deduction for • People who checked any box on line 39a, 39b, or 39c or who can be claimed as a dependent, see page 34. • All others: Single or married filing separately, $5,450; Married filing jointly or Qualifying widow(er), $10,900; Head of household, $8,000	c	Check if standard deduction includes real estate taxes or disaster loss (see page 34) ▶ 39c		
	40	Itemized deductions (from Schedule A) or your standard deduction (see left margin)	40	9,156.
	41	Subtract line 40 from line 38	41	51,527.
	42	If line 38 is over $119,975, or you provided housing to a Midwestern displaced individual, see page 36. Otherwise, multiply $3,500 by the total number of exemptions claimed on line 6d	42	7,000.
	43	Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0-	43	44,527.
	44	Tax (see page 36). Check if any tax is from: a ☐ Form(s) 8814 b ☐ Form 4972	44	4,836.
	45	Alternative minimum tax (see page 39). Attach Form 6251	45	
	46	Add lines 44 and 45	46	4,836.
	47	Foreign tax credit. Attach Form 1116 if required	47	
	48	Credit for child and dependent care expenses. Attach Form 2441	48	
	49	Credit for the elderly or the disabled. Attach Schedule R	49	
	50	Education credits. Attach Form 8863	50	
	51	Retirement savings contributions credit. Attach Form 8880	51	
	52	Child tax credit (see page 42). Attach Form 8901 if required	52	
	53	Credits from Form: a ☐ 8396 b ☐ 8839 c ☐ 5695	53	
	54	Other credits from Form: a ☐ 3800 b ☐ 8801 c ☐	54	
	55	Add lines 47 through 54. These are your TOTAL CREDITS	55	
	56	Subtract line 55 from line 46. If line 55 is more than line 46, enter -0-	56	4,836.
Other Taxes	57	Self-employment tax. Attach Schedule SE	57	
	58	Unreported social security and Medicare tax from Form: a ☐ 4137 b ☐ 8919	58	
	59	Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 8329 if required	59	
	60	Additional taxes: a ☐ AEIC payments b ☐ Household employment taxes. Attach Schedule H	60	
	61	Add lines 56 through 60. This is your total tax	61	4,836.
Payments	62	Federal income tax withheld from Forms W-2 and 1099	62	1,141.
If you have a qualifying child, attach Schedule EIC.	63	2008 estimated tax payments and amount applied from 2007 return	63	
	64a	Earned income credit (EIC)	64a	
	b	Nontaxable combat pay election 64b		
	65	Excess social security and tier 1 RRTA tax withheld (see page 61)	65	
	66	Additional child tax credit. Attach Form 8812	66	
	67	Amount paid with request for extension to file (see page 61)	67	
	68	Credits from Form: a ☐ 2439 b ☐ 4136 c ☐ 8801 d ☐ 8885	68	
	69	First-time homebuyer credit. Attach Form 5405	69	
	70	Recovery rebate credit (see worksheet on pages 62 and 63)	70	
	71	Add lines 62 through 70. These are your total payments	71	1,141.
Refund Direct deposit? See page 63 and fill in 73b, 73c, and 73d, or Form 8888.	72	If line 71 is more than line 61, subtract line 61 from line 71. This is the amount you overpaid	72	
	73a	Amount of line 72 you want refunded to you. If Form 8888 is attached, check here ▶ ☐	73a	
	b	Routing number XXXXXXXXX ▶ c Type: ☐ Checking ☐ Savings		
	d	Account number XXXXXXXXXXXXXXXXX		
	74	Amount of line 72 you want applied to your 2009 estimated tax ▶ 74		
Amount You Owe	75	Amount you owe. Subtract line 71 from line 61. For details on how to pay, see page 65	75	3,696.
	76	Estimated tax penalty (see page 66) 76		
Third Party Designee	Do you want to allow another person to discuss the return with the IRS (see page 66)? [X] Yes. Complete the following. ☐ No			
	Designee's name ▶ HR BLOCK	Phone no. ▶ (704) 289-2487	Personal ID number (PIN) ▶ 32387	
Sign Here Joint return? See page 15. Keep a copy for your records.	Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.			
	Your signature	Date	Your occupation MANAGEMENT	Daytime phone number
	Spouse's signature. If a joint return, both must sign	Date	Spouse's occupation	
Paid Preparer's Use Only	Preparer's signature	Date 4/13/2009	Check if self-employed ☐	Preparer's SSN or PTIN P00099533
	Firm's name (or yours if self-employed), address, and ZIP code H AND R BLOCK SERVICE INC WAXHAW, NC 28173		EIN 56-1984385	Phone no. (704) 242-2615

Form 1040 (2008)

1040 (2008) Form Cutter Pro Copyright 1998 - 2008 H&R Block Tax Services Inc. FD1040, FV 1.28

APPENDIX D

[Logo] U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

P.O. Box 8530
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Bretz, Kerry William, Esquire
299 Broadway, Suite 810,
New York, NY 10007-0000

U.S. INS/HAR
450 Main SE Room 484
Hartford, CT 06103-3060

March 5, 1999

JEREZ-SANCHEZ, MAYRA ISABEL
A#: 34-137-500

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours.

Paul W. Schmidt
Chairman

/s/ Paul W. Schmidt

Enclosure

Panel Members:

GUENDELSBERGER,
HOLMES, DAVID. B
JONES, PHILEMINA M.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, VA 22401

Decision of the Board of Immigration Appeals

DATE: MAR 5, 1999

File: A34 137 500 - Danbury

In re: MAYRA ISABEL JEREZ-SANCHEZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kerry William Bretz, Esquire
299 Broadway, Suite 810
New York, New York 10007

ON BEHALF OF SERVICE:

Lawrence J. Hadfield
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii),
I&N Act [8 § 1251(a)(2)(A)(iii))
Convicted of aggravated felony

Sec. 241(a)(2)(B)(i),
I&N Act [8 U.S.C. § 1251(a)(2)0301 -
Convicted of controlled substance violation

ORDER:

PER CURIAM. The Immigration Judge has determined that the respondent is deportable as charged, that she is not eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and that she must be deported to her native Dominican Republic. The respondent has filed

a timely appeal of the Immigration Judge's decision. The appeal is dismissed. The respondent's request for oral argument before the Board is denied. 8 C.F.R. § 3. 1(e).

The record shows that the respondent was convicted on September 16, 1994, in the United States District Court, District of New Jersey, for the offense of "Distribution of a Schedule II controlled substance (cocaine)." She was sentenced to a 70-month term of imprisonment. Exh. 2. The sole issues argued on appeal concern the respondent's desire to pursue an application for relief from deportation under section 212(c) of the Act, 8 U.S.C. § 1182(c)[1]. We find, however, that the respondent is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d).

The respondent argues on appeal that the AEDPA may not be retroactively applied, and that she is entitled to section 212(c) relief because her criminal conviction occurred before the enactment of the AEDPA on April 24, 1996. *See* Respondent's Brief at 1-10.

The respondent cites no controlling that would have us conclude that the AEDPA may not be applied in this case because her criminal offense predated

---

[1] The respondent does not contest the adequacy of the transcript of the proceedings.

enactment of the AEDPA on April 24, 1996. We find that the AEDPA is not retroactively applied here. and *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998) does not control this case because the respondent was not in deportation proceedings when the AEDPA was enacted. The proceedings were not initiated until October 1, 1996, when the order to show cause and notice to appear was filed by the Immigration and Naturalization Service with the Immigration Court. *See* 8 C.F.R. § 3.14; Exh. 1. *See also Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990) (jurisdiction vests and proceedings commence when a charging document is filed the Immigration Court).

The respondent further argues that the AEDPA violates the due process clause of the Fifth Amendment because the new section 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. *See* Respondent's Brief at 10-15. However, section 440(d) of the AEDPA, as written by Congress, distinguishes between aliens in deportation and exclusion proceedings. As we are without authority to question its constitutionality, we will not address the merits of this argument. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997). We decline to adjourn these proceedings. The appeal is dismissed.

/s/ David B. Holmes
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of: Case No.: A 34-137-500

[Illegible] Docket: DANBURY F.C.I

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on _____.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☑ The respondent was ordered deported to the Dominican Republic.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

☐ Respondent's application for voluntary departure was granted until _____ with an alternate order of deportation to _____ or _____.

☐ Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

☐ Respondent's application for withholding of deportation was ( )granted ( )denied ( ) withdrawn ( )other.

☐ Respondent's application for suspension of deportation was ( )granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( )denied ( )withdrawn ( )other.

☐ Respondent's application for _____was ( )granted ( )denied ( )withdrawn ( )other.

☐ Proceedings were terminated.

☐ The application for adjustment of status under Section (216) (216A) (245) (249) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

☐ Respondent's status was rescinded under Section 246.

☐ Other

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the immigration Judge's oral decision.

/s/ [Illegible]
Immigration Judge

Date: Sept. 10, 1997

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Boston, Massachusetts

File No.: A 34 137 500

In the Matter of	) IN DEPORTATION
MAYRA JEREZ-SANCHEZ	) PROCEEDINGS
	)
Respondent	)

CHARGE: Section 241(a)(2)(B)(i) - she had been convicted of a drug related conviction. The Respondent was also charged with being convicted of an aggravated felony.

APPLICATION: Section 212(c) relief.

ON BEHALF OF RESPONDENT:

ON BEHALF OF SERVICE:

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent in this case, Mayra Jerez-Sanchez, is a native and citizen of the Dominican Republic. The Respondent is a permanent resident of the United States. In the pleadings that have been filed with this Court, the respondent is requesting a 212(c) hearing based on the fact that she is a lawful permanent resident.

The issue that this Court must come to grips with in this case is whether or not the respondent qualifies for 212(c) relief. This Court concludes, and this whole case is based on the documentation that has been

provided to the Court in the Exhibits, that the respondent is not eligible for 212(c) relief because of her conviction for an aggravated felony. As stated to the respondent, while she was being detained, that if in fact the Second Circuit was to overrule the Board of Immigration Appeals' interpretation of AEDPA and its application to 212(c) relief, she would be entitled to come back to this Court. At this point in time, however, because of the fact that she is not entitled to the relief, the Court has no other option but to order that the respondent be deported to the Dominican Republic. That is essentially the holding of this case, and as it relies strictly on the law as it currently exists.

Although there is some problems with the transcripts that were originally developed, it is the position of this Judge that it would serve no useful purpose to reconvene another hearing to go over the case.

/s/ WILLIAM P. JOYCE
WILLIAM P. JOYCE
Immigration Judge

APPENDIX G

TITLE 8—ALIENS AND NATIONALITY
CHAPTER 12—IMMIGRATION AND NATIONALITY
SUBCHAPTER II—IMMIGRATION
Part II—Admission Qualifications for Aliens;
Travel Control of Citizens and Aliens

Sec. 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder,

which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is excludable.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is excludable.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is excludable.

(C) Controlled substance traffickers

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is excludable.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, entry, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, entry, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is excludable.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is excludable.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is excludable.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely

to engage after entry in any terrorist activity (as defined in clause (iii)),

is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is excludable.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on

the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i)In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is excludable.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecutions or genocide

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is excludable.

(ii) Participation in genocide

Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable.

(4) Public charge

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule

For purposes of clause (i)(I), an alien described in this clause is an alien who—

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(B) Unqualified physicians

An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is excludable, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Application of grounds

The grounds for exclusion of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) Illegal entrants and immigration violators

(A) Aliens previously deported

Any alien who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation is excludable, unless prior to the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory the Attorney General has consented to the alien's reapplying for admission.

(B) Certain aliens previously removed

Any alien who—

(i) has been arrested and deported,

(ii) has fallen into distress and has been removed pursuant to this chapter or any prior Act,

(iii) has been removed as an alien enemy, or

(iv) has been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title,

and (a) who seeks admission within 5 years of the date of such deportation or removal, or (b) who seeks admission within 20 years in the case of an alien convicted of an aggravated felony, is excludable, unless before the date of the alien's embarkation or reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory the Attorney General has consented to the alien's applying or reapplying for admission.

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought

to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

(D) Stowaways

Any alien who is a stowaway is excludable.

(E) Smugglers

(i) In general

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is excludable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

(F) Subject of civil penalty

An alien who is the subject of a final order for violation of section 1324c of this title is excludable.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing 'identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general

Any nonimmigrant who--

(I) is not in possession of a passport valid for a minimum of six months from the date of the expira-

tion of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is excludable.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (l) of this section.

(iv) Visa waiver pilot program

For authority to waive the requirement of clause (i) under a pilot program, see section 1187 of this title.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is excludable.

(B) Draft evaders

Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is excludable, except that this subparagraph shall not apply to an alien who at the time of

such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Miscellaneous

(A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is excludable.

(B) Guardian required to accompany excluded alien

Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 1227(e) of this title, whose protection or guardianship is required by the alien ordered excluded and deported, is excludable.

(C) International child abduction

(i) In general

Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is excludable until the child is surrendered to the person granted custody by that order.

(ii) Exception

Clause (i) shall not apply so long as the child is located in a foreign state that is a party to the Hague Convention on the Civil Aspects of International Child Abduction.

(b) Notices of denials

If an alien's application for a visa, for admission to the United States, or for adjustment of status is

denied by an immigration or consular officer because the officer determines the alien to be excludable under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(1) states the determination, and

(2) lists the specific provision or provisions of law under which the alien is excludable or ineligible for entry or adjustment of status.

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

APPENDIX H

Pub. L. 104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996

SEC. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(a) IN GENERAL.—Chapter 4 of title II is amended—

(1) by redesignating section 239 (8 U.S.C. 1229) as section 234 and by moving such section to immediately follow section 233;

(2) by redesignating section 240 (8 U.S.C. 1230) as section 240C; and

(3) by inserting after section 238 the following new sections:

"INITIATION OF REMOVAL PROCEEDINGS

"SEC. 239. (a) NOTICE TO APPEAR.—

"(1) IN GENERAL.—In removal proceedings under section 240, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

"(A) The nature of the proceedings against the alien.

"(B) The legal authority under which the proceedings are conducted.

"(C) The acts or conduct alleged to be in violation of law.

"(D) The charges against the alien and the statutory provisions alleged to have been violated.

"(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

"(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 240.

"(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

"(iii) The consequences under section 240(b)(5) of failure to provide address and telephone information pursuant to this subparagraph. "(G)(i) The time and place at which the proceedings will be held.

"(ii) The consequences under section 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.

"(2) NOTICE OF CHANGE IN TIME OR PLACE OF PROCEEDINGS.—

"(A) IN GENERAL.—In removal proceedings under section 240, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

"(i) the new time or place of the proceedings, and

"(ii) the consequences under section 240(b)(5) of failing, except under exceptional circumstances, to attend such proceedings.

"(B) EXCEPTION.—In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F),

"(3) CENTRAL ADDRESS FILES.—The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

"(b) SECURING OF COUNSEL.—

"(1) IN GENERAL.—In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 240, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

"(2) CURRENT LISTS OF COUNSEL.—The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 240. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 240 if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

"(c) SERVICE BY MAIL.—Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

"(d) PROMPT INITIATION OF REMOVAL.—(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

"(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

"REMOVAL PROCEEDINGS

"SEC. 240. (a) PROCEEDING.—

"(1) IN GENERAL.—An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

"(2) CHARGES.—An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a).

"(3) EXCLUSIVE PROCEDURES.—Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 238.

"(b) CONDUCT OF PROCEEDING. —

"(1) AUTHORITY OF IMMIGRATION JUDGE.—The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.

"(2) FORM OF PROCEEDING.—

"(A) IN GENERAL.—The proceeding may take place—

"(i) in person,

"(ii) where agreed to by the parties, in the absence of the alien,

"(iii) through video conference, or

"(iv) subject to subparagraph (B), through telephone conference.

"(B) CONSENT REQUIRED IN CERTAIN CASES.—An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

"(3) PRESENCE OF ALIEN.—If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

"(4) ALIENS RIGHTS IN PROCEEDING.—In proceedings under this section, under regulations of the Attorney General—

"(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

"(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act, and

"(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

"(5) CONSEQUENCES OF FAILURE TO APPEAR.—

"(A) IN GENERAL.—Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)).

The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 239(a)(1)(F).

"(B) NO NOTICE IF FAILURE TO PROVIDE ADDRESS INFORMATION.—No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 239(a)(1)(F).

"(C) RESCISSION OF ORDER.—Such an order may be rescinded only—

"(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

"(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 239(a) or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

"(D) EFFECT ON JUDICIAL REVIEW.—Any petition for review under section 242 of an order entered in absentia under this paragraph shall (except in cases described in section 242(b)(5)) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

"(E) ADDITIONAL APPLICATION TO CERTAIN ALIENS IN CONTIGUOUS TERRITORY.—The preceding provisions of this paragraph shall

apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 235(b)(2)(C).

"(6) TREATMENT OF FRIVOLOUS BEHAVIOR.—The Attorney General shall, by regulation—

"(A) define in a proceeding before an immigration judge or before an appellate administrative body under this title, frivolous behavior for which attorneys may be sanctioned,

"(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

"(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

"(7) LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR.—Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 239(a), was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1)) to attend a proceeding under this section, shall not be eligible for relief under section 240A, 24013, 245, 248, or 249 for

a period of 10 years after the date of the entry of the final order of removal.

"(c) DECISION AND BURDEN OF PROOF.— "(1) DECISION.—

"(A) IN GENERAL: At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

"(B) CERTAIN MEDICAL DECISIONS.—If a medical officer or civil surgeon or board of medical officers has certified under section 232(b) that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 212(a), the decision of the immigration judge shall be based solely upon such certification.

"(2) BURDEN ON ALIEN.—In the proceeding the alien has the burden of establishing—

"(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212; or

"(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

"(3) BURDEN ON SERVICE IN CASES OF DEPORTABLE ALIENS.—

"(A) IN GENERAL.—In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.

No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

"(B) PROOF OF CONVICTIONS.—In any proceeding under this Act, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

"(i) An official record of judgment and conviction.

"(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

"(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

"(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

"(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

"(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

"(C) ELECTRONIC RECORDS.—In any proceeding under this Act, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

"(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

"(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository. A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

"(4) NOTICE.—If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

"(5) MOTIONS TO RECONSIDER.—

"(A) IN GENERAL.—The alien may file one motion to reconsider a decision that the alien is removable from the United States.

"(B) DEADLINE.—The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

"(C) CONTENTS.—The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

"(6) MOTIONS TO REOPEN.—

"(A) IN GENERAL.—An alien may file one motion to reopen proceedings under this section.

"(B) CONTENTS.—The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

"(C) DEADLINE.—

"(i) IN GENERAL.—Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

"(ii) ASYLUM.—There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discoverd or presented at the previous proceeding.

"(iii) FAILURE TO APPEAR.—The filing of a motion to reopen an order entered pursuant to subsection (b)(5) is subject to the deadline specified in subparagraph (C) of such subsection.

"(d) STIPULATED REMOVAL.—The Attorney General shall provide by regulation for the entry by

an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

"(e) DEFINITIONS.—In this section and section 240A:

"(1) EXCEPTIONAL CIRCUMSTANCES.—The term 'exceptional circumstances' refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

"(2) REMOVABLE.—The term 'removable' means—

"(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 212, or

"(B) in the case of an alien admitted to the United States, that the alien is deportable under section 237. "CANCELLATION OF REMOVAL ADJUSTMENT OF STATUS

"SEC. 240A. (a) CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

"(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

"(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

"(3) has not been convicted of any aggravated felony.

"(b) CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS.—

"(1) IN GENERAL.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

"(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

"(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and

"(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

"(2) SPECIAL RULE FOR BATTERED SPOUSE OR CHILD.—The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

"(A) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent);

"(B) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;

"(C) the alien has been a person of good moral character during such period:

"(D) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237 (a), and has not been convicted of an aggravated felony; and

"(E) the removal would result in extreme hardship to the alien, the alien's child, or (in the case of an alien who is a child) to the alien's parent.

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

"(3) ADJUSTMENT OF STATUS.—The Attorney General may adjust to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2). The number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year. The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under t his paragraph.

"(c) ALIENS INELIGIBLE FOR RELIEF.—The provisions of subsections (at and (b)(1) shall not apply to any of the following aliens:

"(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

"(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J). or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 212(e).

"(3) An alien who—

"(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J) or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

"(B) is subject to the two-year foreign residence requirement of section 212(e). and

"(C) has not fulfilled that requirement or received a waiver thereof.

"(4) An alien who is inadmissible under section 212(a)(3) or deportable under section 237(a)(4).

"(5) An alien who is described in section 241(b)(3)(B)(i).

"(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

"(d) SPECIAL RULES RELATING TO CONTINUOUS RESIDENCE OR PHYSICAL PRESENCE.—

"(1) TERMINATION OF CONTINUOUS PERIOD. — For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237 (a)(4), whichever is earliest.

"(2) TREATMENT OF CERTAIN BREAKS IN PRESENCE.—An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

"(3) CONTINUITY NOT REQUIRED BECAUSE OF HONORABLE SERVICE IN ARMED FORCES AND PRESENCE UPON ENTRY INTO SERVICE.— The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

"(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

"(B) at the time of the alien's enlistment or induction was in the United States.

"(e) ANNUAL LIMITATION.—The Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and

adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment and whether such an alien had previously applied for suspension of deportation under such section 244(a).

VOLUNTARY DEPARTURE

"SEC. 240B. (a) CERTAIN CONDITIONS.—

"(1) IN GENERAL.—The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4)(B).

"(2) PERIOD.—Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

"(3) BOND.—The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

"(4) TREATMENT OF ALIENS ARRIVING IN THE UNITED STATES.—In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 240 are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an

alien from withdrawing the application for admission in accordance with section 235(a)(4).

"(b) AT CONCLUSION OF PROCEEDINGS.—

"(1) IN GENERAL.—The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

"(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a);

"(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

"(C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4); and

"(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so. "(2) PERIOD.—Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

"(3) BOND.—An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

"(c) ALIENS NOT ELIGIBLE.—The Attorney General shall not permit an alien to depart voluntarily under this section If the alien was previously

permitted to so depart after having been found inadmissible under section 212(a)(6)(A).

"(d) CIVIL PENALTY FOR FAILURE TO DEPART.—If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 240A, 245, 248, and 249. The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.

"(e) ADDITIONAL CONDITIONS.—The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

"(f) JUDICIAL REVIEW.—No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure".

(b) REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

(c) STREAMLINING REMOVAL OF CRIMINAL ALIENS—

(1) IN GENERAL.—Section 242A(b)(4) (8 U.S.C. 1252a(b)(4)), as amended by section 442(a) of Public Law 104-132 and before redesignation by section 308 (b)(5) of this division, is amended—

(A) by striking subparagraph (D);

(B) by amending subparagraph (E) to read as follows:

"(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice; and (C) by redesignating subparagraphs (F) and (G) as subparagraph (E) and (F), respectively.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall be effective as if included in the enactment of section 442(a) of Public Law 104-132.

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(2)

No. 09-1211

In the Supreme Court of the United States

MAYRA ISABEL JEREZ-SANCHEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an alien who was convicted of an aggravated felony after a trial and was then placed in a deportation proceeding before April 1997, must make an individualized showing of having relied on the possibility of a discretionary waiver of deportation in order to establish eligibility for such a waiver under former 8 U.S.C. 1182(c) (repealed 1996).

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In the Supreme Court of the United States

No. 09-1211

MAYRA ISABEL JEREZ-SANCHEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 3a-7a, 50a-53a) and the Immigration Judge (Pet. App. 54a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2010. The petition for a writ of certiorari was filed on April 6, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. In September 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non retroactivity, that IIRIRA's repeal of Section 212(c)

should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the sentence the alien received under the plea agreement would not have rendered him ineligible for relief under former Section 212(c), but a greater sentence, of five years or more, would have done so. 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

The regulations also authorized an alien who was already subject to an administratively final order of deportation or removal to file a "[s]pecial motion to seek [S]ection 212(c) relief" that was exempt from the usual limits on the timing and number of motions to reopen or

reconsider. 8 C.F.R. 1003.44. The regulations required such a special motion to be filed by April 26, 2005. 8 C.F.R. 1003.44(h). In addition to incorporating the eligibility requirements contained in 8 C.F.R. 1212.3, the section authorizing special motions to reopen independently provided that it was "not applicable with respect to any conviction entered after trial." 8 C.F.R. 1003.44(a).

2. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as an immigrant in 1976. Pet. App. 6a; Administrative Record (A.R.) 201. In September 1994, she was convicted by a jury of "Distribution of a Schedule II controlled substance (cocaine)" in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and was sentenced to a term of 70 months in prison, although she ultimately served less than five years of that sentence. Pet. App. 19a, 52a; A.R. 140-141, 201.

In September 1996, the INS commenced deportation proceedings against petitioner, charging her with being deportable as an alien convicted of a controlled-substance offense and as an alien convicted of an aggravated felony (drug trafficking). Pet. App. 51a; A.R. 201-206; see 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994). The immigration judge (IJ) found petitioner to be deportable as charged, and because he determined that she was not eligible for any relief from deportation after AEDPA, ordered her deported to the Dominican Republic. Pet. App. 54a-57a.

Petitioner appealed to the Board of Immigration Appeals (Board), which, in March 1999, dismissed her appeal, finding that she was statutorily ineligible for relief under Section 212(c) in light of her aggravated felony conviction. Pet. App. 50a-53a. Petitioner filed a petition for judicial review, which was transferred by the Second

Circuit to district court, and later dismissed. See 99-4046 Docket entry (2d Cir. Aug. 10, 1999); 00-cv-982 Docket entry (D. Conn. Jan. 31, 2002).

3. In April 2009—more than ten years after the Board had rejected petitioner's appeal from her order of deportation—petitioner filed with the Board a special motion to Seek 212(c) relief, pursuant to 8 C.F.R. 1003.44. Pet. App. 8a-22a. Petitioner acknowledged that her motion was untimely under the regulation, but argued that the April 26, 2005 deadline for such special motions was "arbitrary" and "place[d] a new retroactive effect to AEDPA in clear violation of the holding of *St. Cyr*." *Id.* at 16a-19a. She claimed that, notwithstanding her conviction after a trial, she was eligible for relief under former Section 212(c) because, she said, *St. Cyr* "held that 212(c) should be available to aliens who were convicted prior to the enactment of AEDPA and IIRIRA." *Id.* at 19a-20a.

In May 2009, the Board denied petitioner's special motion, stating that, on the merits, she was ineligible for relief under Section 212(c) because she "was convicted after a trial, not by a plea of guilty." Pet. App. 6a-7a. The Board also held that petitioner's motion was untimely, because it was filed almost four years after the April 26, 2005 deadline and petitioner had not "argued or established" any "facts warranting an exception to th[e] timeliness requirement." *Id.* at 7a.

4. Petitioner sought judicial review in the Second Circuit, and the government moved for summary affirmance on the ground that petitioner's special motion for Section 212(c) relief had been untimely. Gov't C.A.

Mot. 7-8.[1] The court of appeals construed the government's motion as one requesting summary denial of petitioner's petition for review and granted it, holding that "[b]ecause petitioner is not eligible for relief under § 212(c) of the Immigration and Nationality Act due to her conviction for an aggravated felony after a jury trial, the [Board] did not abuse its discretion in denying her special motion made pursuant to 8 C.F.R. § 1003.44." Pet. App. 1a-2a. The court did not expressly address the Board's alternate holding (also urged in the government's motion for summary affirmance) that petitioner's special motion to reopen was untimely. See *ibid.*

ARGUMENT

The unpublished order of the court of appeals does not warrant review. Although the court of appeals stated that petitioner is ineligible for relief under former Section 212(c) in light of her conviction after trial for an aggravated felony, it did not explain its reasoning. See Pet. App. 2a. Nor did the government address that issue in its motion for summary affirmance in the court of appeals. See p. 5 & n.1, *supra*. And the court of appeals' unpublished order does not establish binding precedent in the Second Circuit.

The question petitioner seeks to raise involves the retroactive effect of a statutory repeal that occurred 14 years ago, and this Court has repeatedly denied petitions urging a similar extension of its decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). See, *e.g.*, *De Johnson* v.

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[1] In a footnote, the government stated that the untimeliness of petitioner's special motion "render[ed] moot the Board's additional holding that [petitioner], in any event, was not even eligible for 212(c) relief since she was convicted after a trial, rather than after a plea agreement." Gov't C.A. Mot. 8 n.1.

Holder, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003). Moreover, petitioner's claim is independently barred by the Board's determination that her special motion for Section 212(c) relief was untimely by nearly four years.

1. Petitioner contends that the decision below conflicts with this Court's retroactivity analysis, either because reliance interests need not be taken into account in deciding whether the repeal of Section 212(c) applies to aliens in her position (Pet. 26-28), or because an alien deciding to go to trial would have done so "in reasonable reliance on the continuing availability of Section 212(c) relief" (Pet. 28-29). Those objections lack merit.

a. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the gov-

ernment numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. Petitioner's contrary view— that the prospect of reliance is irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 27) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). Those cases do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. Petitioner also argues (Pet. 30-31) that the court of appeals' reasoning conflicts with the canon of statutory interpretation, described in *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005), that a single statutory term cannot be construed to have different mean-

ings based on the factual circumstances of the applicant. That canon is inapplicable to the relevant aspect of this Court's retroactivity analysis. *Clark* interpreted a statutory term. See 543 U.S. at 378. The second step of retroactivity analysis, on the other hand, determines the temporal reach of a statute only when it has been established that the statute contains no provision establishing its retroactivity. See *St. Cyr*, 533 U.S. at 316-317. Where the application of a statute would have retroactive effect, retroactivity analysis may require a court to decline to apply the statute. *Id.* at 316. Conversely, in a case where the same statute would not have retroactive effect, there is no reason not to apply the statute. See *Landgraf*, 511 U.S. at 269-270. Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Ibid.* (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added). That understanding is likewise embodied in the regulations promulgated by the Department of Justice following *St. Cyr*, concerning the availability of relief under Section 212(c) in proceedings before an IJ or the Board. See pp. 3-4, *supra*. One regulation, promulgated in the exercise of the Attorney General's discretion in implementing the INA, provides a special-motion procedure to seek relief under former Section 212(c) for aliens

who had received a final order of removal or deportation and could otherwise no longer file a motion to reopen their proceedings. 8 C.F.R. 1003.44. That regulation separately provides that it is unavailable "with respect to any conviction entered after trial." 8 C.F.R. 1003.44(a).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err to the extent that its unexplained decision may have relied on the absence of a prospect of reliance as part of its "commonsense, functional judgment" about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner argues in the alternative (Pet. 28-29) that all aliens who went to trial before IIRIRA should be deemed, as a categorical matter, to have objectively reasonably relied on the availability of Section 212(c) relief.

That conclusion, however, does not follow from the case law and is contrary to common sense.

As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto* v. *Holder*, 593 F.3d 638, 644-645 (2010), petition for cert. pending, No. 09-1333 (filed Apr. 28, 2010). And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences flowing from *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not the sort of decision that is protected against application of subsequent limitations on the scope of Section 212(c), whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that would not bar relief, or the continued availability of relief at all. See *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 495-496 & n.14 (3d Cir. 2004); *Rankine* v. *Reno*, 319 F.3d 93, 101-102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigor-

ously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190 F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances are distinct from those of aliens whom the courts have found to be eligible for since-repealed relief by virtue of reliance that took some form other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927 (2007), took the affirmative step of bringing "herself—and her criminal convictions—to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. *Id.* at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (2006), was held to have made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for § 212(c) relief." *Id.* at 1199.

Petitioner, by contrast, identifies no affirmative act that she performed in possible reliance on the availability of Section 212(c) before its repeal. She cannot advance any claim that she actually relied at any time during her criminal case on the possibility of Section 212(c) relief, because she has admitted that she was "completely unaware" at the time of her trial (and any subsequent decision whether to appeal) that a conviction

would render her deportable, much less that she would have been ineligible for relief from deportation under Section 212(c) if she then served a prison sentence of more than five years. Pet. App. 20a. Moreover, as an objective matter, it would not have made sense for petitioner to decide to go to trial and thus *increase* her risk of receiving a lengthier sentence than she would under a guilty plea, when she would become altogether ineligible for Section 212(c) relief once she served five years of a prison term imposed after trial. Indeed, after trial, petitioner did receive a 70-month sentence, which, between 1990 and 1996, would have been disqualifying had she served all of it. See p. 2, *supra*.[2]

2. Petitioner contends (Pet. 9-15) that there is a significant conflict among the circuits about the availability of Section 212(c) relief to aliens who went to trial and were convicted of crimes before the enactment of IIRIRA. As an initial matter, her case does not turn on the actual questions presented in her petition. But, in any event, the disagreement that petitioner identifies in the analysis of the circuits is narrow.

a. Petitioner's questions presented, her description of the disagreement in the circuits, and her argument on the merits are all directed at the retroactive application of the repeal of Section 212(c) by Section 304(b) of IIRIRA. Pet. i, 8-9, 22, 26. But that is not the provision that rendered petitioner ineligible for relief under Section 212(c). Petitioner's deportation proceedings began

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[2] Moreover, having received a 70-month sentence, petitioner would presumably have had an incentive, like the alien in *Hernandez de Anderson*, *supra*, to bring herself and her conviction to the attention of the government in order to ensure that deportation proceedings could be concluded before she served sufficient time in prison (60 months) to disqualify her from relief under Section 212(c).

in September 1996, seven months before IIRIRA's repeal of Section 212(c) became effective. See pp. 2, 4, *supra*. Thus, both the Board and the IJ found petitioner ineligible for relief under Section 212(c) because Section 440(d) of AEDPA made Section 212(c) relief unavailable to those with aggravated-felony convictions. Pet. App. 52a, 57a. When the Board denied her special motion to reopen, it again cited Section 440(d) of AEDPA —not IIRIRA's subsequent repeal. *Id.* at 6a.

b. Even assuming that the answer to the questions petitioner presents about IIRIRA would also apply to the AEDPA provision that actually barred her from Section 212(c) relief, the divergences of analysis in the courts of appeals are, as a practical matter, narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine*, 319 F.3d at 102 (2d Cir.); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, 592 F.3d 700, 705-707 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008)[3]; *Armendariz-Montoya*, 291 F.3d at 1121 (9th Cir.); *Hem*, 458 F.3d at 1189 (10th Cir.); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have held that no show-

[3] Petitioner states that the Seventh Circuit has "created a limited exception to its otherwise categorical rule," but the exception identified by petitioner would still require an alien to establish "'reliance on the possibility of § 212(c) relief.'" Pet. 15 (quoting *De Horta Garcia*, 519 F.3d at 661).

ing concerning reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the Board from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009).[4]

Petitioner suggests (Pet. 9-11) that she would be eligible for relief under former Section 212(c) in the Third and Eighth Circuits. But that is by no means clear.

In *Atkinson*, the alien was placed in a removal proceeding in June 1997; the Third Circuit thus evaluated the retrospective effect of IIRIRA, which, as discussed above, is not applicable here. Moreover, the *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Sec-

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[4] Petitioner cites (Pet. 11) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting any reliance requirement for retroactivity analysis. But *Olatunji* involved the retroactive application of a change in the definition of the term "admission," and itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). And petitioner acknowledges (Pet. 11 n.2) that, after *Olatunji*, the Fourth Circuit held that "IIRIRA's repeal of [Section] 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

tion 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Petitioner's invocation (Pet. 11) of the Eighth Circuit's decision in *Lovan*, *supra*, is even less relevant. The judgment in *Lovan* turned on facts not present here, and does not show that petitioner would have prevailed in the Eighth Circuit.[5] But, to the extent that *Lovan* follows *Atkinson*, the deviation in the circuits' analysis remains narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, the

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[5] Unlike petitioner, Lovan was convicted after trial in 1991 of an offense (sexual abuse of a minor) that was not an aggravated felony before enactment of IIRIRA, and was placed in a removal proceeding, not a deportation proceeding. Although the court stated that the fact that Lovan was convicted after trial did not "preclude[] relief under *St. Cyr*," 574 F.3d at 994, that was extraneous to the court's reasoning and judgment. The court determined that the designation of Lovan's crime as an aggravated felony rendered him ineligible for Section 212(c) relief. See *id.* at 996 (observing that Lovan "would be ineligible for relief under former § 212(c) * * * after his 1991 conviction for sexual abuse of a minor because of the statutory counterpart doctrine"). Lovan's main argument that he was entitled to relief was based on the fact that he had left the country and been re-admitted in 2002, although he could have been found inadmissible on his application for admission for a conviction of a crime involving moral turpitude. *Id.* at 994. And, if he had been found inadmissible on that basis, then he would have been eligible to apply for Section 212(c) relief (assuming that a conviction following a trial was not a bar). Lovan argued that the Board should have treated him *nunc pro tunc* as if he had departed and sought re-admission before his crime was designated an aggravated felony. *Id.* at 995-996. The decision in *Lovan* focused on that situation-specific argument, and the court remanded for the Board to reconsider it. Here, by contrast, petitioner was placed in deportation proceedings during her incarceration. Therefore, the result in this case does not conflict with *Lovan*.

difference from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect *may* be based on the prospect of reliance. Thus, as the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto*, 593 F.3d at 644.

c. Finally, to the extent petitioner contends that the court of appeals "made its decision in conscious rejection of the law previously adopted" by the Second Circuit (Pet. 15), it is not generally this Court's role to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And that is, of course, all the more true when the decision in question is unpublished and does not explain the court's reasoning.

3. Petitioner contends (Pet. 6) that she presents "an important and recurring question of federal law." In fact, the issue is of quite limited prospective importance because it pertains to the retroactive effect of a statutory amendment to former Section 212(c) that occurred fourteen years ago (upon the enactment of AEDPA) and was superseded less than one year later by another statutory amendment (upon the effective date of IIRIRA).

Petitioner notes the existence of a number of judicial decisions addressing the retroactive availability of Section 212(c) relief. Pet. 15-19 & n.4. But, as the government explained in its brief opposing certiorari (at 15-17) in *Ferguson* v. *Holder*, cert. denied, 130 S. Ct. 1735 (2010) (No. 09-263), those decisions are not a reliable indication of the issue's continuing importance, because the great majority of them involved immigration pro-

ceedings (like this one) that were initiated before *St. Cyr*. As a general matter, the number of grants of relief under former Section 212(c) has declined dramatically in recent years: by 55% (from 1905 grants to 858 grants) between FY 2004 and FY 2009. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book*, Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book*, Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell at an even greater rate. In FY 2004, there were 2617 applications; in FY 2698, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline just since FY 2008. In addition, because most criminal defendants plead guilty (see Pet. 17 n.3; *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)), the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial, therefore, would be only a small fraction of those numbers.[6] Finally, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg. 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions (even

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[6] Cf. *Pennaputa*, 373 F.3d at 496 n.16 ("[I]n comparison to the holding in *St. Cyr*, the effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for [Section] 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

those who did not leave and re-enter the United States) have already been exposed to immigration authorities at some point since 2000. That shrinks even further the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance—and one that is already of considerably less current importance than the one on which the government sought review in *St. Cyr* ten years ago. See Pet. 16.

4. Petitioner contends (Pet. 22-26) that this case is a better vehicle for resolving questions about the retroactive application of Section 304(b) of IIRIRA than several others in which this Court has recently denied certiorari. Even setting aside the fact, discussed above, that her case turns on the retroactive effect of AEDPA rather than IIRIRA, this case would be a particularly poor vehicle, because petitioner is incorrect in claiming that, apart from the question about whether *St. Cyr* should be extended to aliens convicted after trial, "there is no dispute that petitioner would otherwise qualify for relief" under former Section 212(c). Pet. 24.

Quite the contrary, petitioner's application for relief is independently barred—as the Board held—by the untimeliness of her special motion. See Pet. App. 7a ("[T]his motion would have been due by April 26, 2005. The motion was not filed until April 15, 2009, and therefore is untimely. No facts warranting an exception to this timeliness requirement have been argued or established.") (citations omitted). Petitioner suggests (Pet. 8) that the deadline for special motions (which was 180 days after the effective date of the regulation) is "arbitrary," "unfair and unconstitutional." The court of appeals did not address the validity of the deadline for spe-

cial motions, which makes it an inappropriate issue for this Court to consider in its capacity as a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). There is, however, no basis for petitioner's objections. Nothing required the issuance of regulations to provide for reopening of removal orders that had long ago become final. *A fortiori*, nothing barred the government from imposing a 180 day filing deadline on that special form of discretionary reopening relief. See also *Johnson* v. *Gonzales*, 478 F.3d 795, 798-800 (7th Cir. 2007) (upholding the 180 day deadline in 8 C.F.R. 1003.44(h) against a challenge that it had an "impermissible retroactive effect").

Accordingly, further review of petitioner's case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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